

No. 12759

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United States  
Court of Appeals  
for the Ninth Circuit.

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M. P. BARBACHANO and THE BORDER  
ELECTRIC AND TELEPHONE CO., INC.,

Appellants,

vs.

LAWRENCE W. ALLEN, WILLIS ALLEN,  
M. F. DEXTER and CINEMA ADVERTIS-  
ING AGENCY,

Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

LEONARD HORWIN,  
121 S. Beverly Drive,  
Beverly Hills, Calif.

For Appellees:

LAWRENCE W. ALLEN,  
1204 S. Hill St.,  
Los Angeles 15, Calif.





In the District Court of the United States, Southern District of California, Central Division  
Civil 827-H

M. P. BARBACHANO, THE BORDER ELECTRIC AND TELEPHONE CO., INC., a Corporation; RADIO DIFUSORA INTERNACIONAL S. A., a Corporation,

Plaintiffs,

vs.

LAWRENCE W. ALLEN, WILLIS ALLEN, CINEMA ADVERTISING AGENCY, M. F. DEXTER, ROBERT NOBLE, CALIFORNIA PENSION FOUNDATION, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE and DOE TEN,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF, FOR INJUNCTION, AND FOR RESCISSION AND DAMAGES

To the Honorable Judges of the District Court of the United States in and for the Southern District of California, Central Division:

Plaintiffs allege:

I.

At all times herein mentioned plaintiff, The Border Electric and Telephone Co., Inc., has been,

and at all times since on or about August 5, 1937, plaintiff Radio Difusora Internacional, S. A., has been, and each of said plaintiffs now is, a corporation duly organized, existing and authorized to do business under and pursuant to the laws and statutes of the Republic of Mexico. Both of said plaintiffs have their principal places of business and offices in the city of Tijuana in the territory of Baja California, Republic of Mexico, hereinafter referred to as "said territory" and "said Republic." [2\*]

## II.

Each and all of the plaintiffs have been at all times herein mentioned and now are citizens and residents of the Republic of Mexico.

## III.

Each and all of the defendants have been at all times herein mentioned and now are citizens and residents of the State of California, United States of America, in the District and Division aforesaid of this Honorable Court.

## IV.

Plaintiffs are presently unaware of the true capacities of the defendants Cinema Advertising Agency and California Pension Foundation, whether individual, corporate, partnership or otherwise, and plaintiffs ask leave of the Court to amend this complaint to set forth such true capacities when the same shall have been ascertained.

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

## V.

Plaintiffs are presently unaware of the true names or capacities, whether individual, partnership, corporate or otherwise, of the defendants Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe Six, Doe Seven, Doe Eight, Doe Nine and/or Doe Ten, inclusive, or any of them, and plaintiffs ask leave of court to amend this complaint to state such true names and capacities when the same shall have been ascertained by plaintiffs.

## VI.

Plaintiffs are informed and believe, and upon the basis of such information and belief allege, that at all times, and in connection with all the matters hereafter mentioned, each and all of the defendants were acting as agents of, with the full knowledge and consent of, and for the use and benefit of, each of the other defendants herein. [3]

## VII.

On or about March 30, 1936, in said city of Tijuana, in said territory and Republic, plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., hereinafter called "Company 1," entered into that certain agreement in writing with the defendant Cinema Advertising Agency dated March 30, 1936, a copy of which is annexed as Exhibit "A" and made a part hereof. By the terms of said agreement it was provided that said plaintiffs should procure from said Republic of Mexico a license or concession for a radio station,

to be located at Rosarito Beach, in said territory and said Republic; that defendant Cinema Advertising Agency should pay all deposits or fees required by said republic in connection with the issuance of said license or concession, such deposits or fees to be payable after said plaintiffs had procured such issuance; that said plaintiffs should provide suitable lands and buildings at Rosarito Beach to house transmitter, studios and antenna for said radio station; that said plaintiffs should sell and deliver electric power for the operation of said radio station, as more particularly mentioned in paragraph No. 6 of said agreement; and that defendants Cinema Advertising Agency should construct said radio station at its own expense.

Subsequent to March 30, 1936, and prior to the events mentioned in paragraph IX, the parties to said agreement modified paragraph No. 5 thereof, in writing, to provide that said license or concession mentioned in said paragraph should be issued in the name of M. P. Barbachano instead of in the name of a company, as mentioned therein. Said agreement together with said modification are hereinafter collectively described as "said agreement."

### VIII.

At all times herein mentioned it was known and understood by all parties to said agreement that said plaintiffs would [4] have to expend approximately \$27,000.00, in order to provide said suitable lands and buildings and the facilities for said electrical power, as required by plaintiffs to be

furnished under said agreement; and that defendants would be required to expend not less than \$120,000.00 in order to construct said radio station as required by them to be constructed under said agreement.

### IX.

On or about September 25, 1936, said plaintiffs mentioned in paragraph VII procured the issuance by said Republic of a license and concession, hereinafter called "said concession," in the name of plaintiff M. P. Barbachano, for a radio station at said Rosarito Beach on a frequency of 730 kilocycles, all as provided in said agreement.

### X.

On or about September 25, 1936, said plaintiffs commenced the construction of said suitable buildings for said radio station, required by them under the terms of said agreement to be constructed, and the construction of electrical power facilities as provided in said agreement, and completed such construction thereof by on or about November 25, 1936, at a total cost to said plaintiffs of approximately \$27,000.00, which cost was then and has at all times since been and now is a reasonable cost for such construction.

### XI.

At all times herein mentioned said plaintiffs named in paragraph VII performed all the other terms and conditions required by them, or any of them, to be performed under said agreement.



## XII.

Under and pursuant to said concession and the conditions imposed by said Republic with respect to the exercise thereof, it was provided that said concession would be null and void on and [5] after October 5, 1936, unless 10,000 pesos in cash or satisfactory bond in same amount (that is to say, approximately \$2,777.77 at the then current rate of exchange between the American dollar and the Mexican peso) were deposited with said Republic on or before that date, to guarantee to said Republic for a period of twenty years the concessionnaire's faithful compliance with the terms of said license and concession.

## XIII.

Promptly following the events mentioned in paragraph IX and on or about September 25, 1936, plaintiffs caused the original of said concession to be delivered to defendants for their inspection, and copy and translation thereof to be delivered to them for their retention, and then and at all times thereafter until the events mentioned in paragraph XV, plaintiffs continued to call to the attention of defendants the provisions of said concession and said conditions imposed by said republic with respect to the exercise thereof, and at all said times made demand on defendants that they comply therewith and with said agreement requiring the payment of deposits and fees as aforesaid, particularly by causing to be deposited with said Republic, on or before October 5, 1936, said sum of 10,000 pesos (or approximately \$2,777.77 at the then current rate of

exchange between the American dollar and the Mexican peso) or said bond in amount mentioned in paragraph XII.

#### XIV.

At all times on and after September 25, 1936, defendants failed and refused to make said deposit mentioned in paragraph XII, or to construct said radio station as required by said agreement and said concession, or at all, or to perform said agreement, or to comply with the conditions of said concession, and have at no time made said deposit or constructed said radio station or performed the other terms or conditions of said agreement and concession [6] on their part required to be performed.

By reason of the matters hereinabove set forth, there was at all times since on or about September 25, 1936, and is now a failure of defendants to furnish the consideration required by them to be furnished plaintiffs under said agreement.

By reason of said failure of consideration and the failure and refusal of defendants to perform said agreement or to comply with the conditions of said concession as aforesaid, defendants are estopped to claim any rights in or to said concession, said suitable lands or buildings, said radio station, or under said agreement.

#### XV.

Promptly following said failure and refusal of defendants mentioned in paragraphs XIII and XIV, and on or about October 5, 1936, said plain-

tiffs duly notified defendants in writing that plaintiffs then and there elected to rescind said agreement and thereby terminate all rights of defendants thereunder, by reason of the failure and refusal of defendants to perform said agreement and to comply with the conditions of said concession.

### XVI.

None of plaintiffs has anything of value belonging to or required to be restored to defendants or any of them.

### XVII.

On or about October 5, 1936, said plaintiffs were compelled by reason of the matters mentioned in paragraphs XII and XIV to make, and said plaintiffs did make, deposit of bond in said sum of 10,000 pesos (or approximately \$2,777.77 at the then current rate of exchange between the American dollar and the Mexican peso) with the government of said Republic, out of said plaintiff's own funds, to prevent said concession from becoming null and void as aforesaid.

Said concession has at all times remained and now remains [7] in full force and effect.

### XVIII.

On or about August 6, 1937, said plaintiffs caused to be duly sold, transferred and assigned to plaintiff Radio Difusora Internacional, S. A., herein called "Company 2," for and in consideration of the issuance of capital stock of Company 2 to M. P. Barbachano, said concession, said suitable lands and



buildings and certain materials, supplies, equipment, apparatus and other properties theretofore and subsequent to October 5, 1936, acquired by said plaintiffs in the construction of said radio station mentioned in paragraph IX. At all times on and after August 6, 1937, and to date hereof, Company 2 was and is the sole owner of said concession, said suitable buildings, lands, and said materials, supplies, equipment, apparatus and other properties.

### XIX.

By reason of said failure and refusal of defendants to perform said agreement and to comply with the conditions of said concession, as aforesaid, plaintiffs were compelled to and they did subsequent to on or about October 5, 1936, and up to on or about February 15, 1940, construct and complete said radio station at a cost of approximately \$120,000.00, in addition to the cost of buildings, lands and electrical facilities hereinabove described, which cost of approximately \$120,000.00 was at all of said times and now is the reasonable cost of construction and completion of said radio station.

### XX.

From and after about February 15, 1940, and at the present time said radio station has been and is in all respects ready for operation for the various commercial and other purposes as contemplated by said agreement, and such operation has been prevented and made impossible solely due to the acts of defendants [8] as hereinafter set out.

## XXI.

At a time or times on and after October 5, 1936, which time or times are not presently known to plaintiffs, defendants entered into a plan, design, combination and conspiracy to commit the acts hereinafter complained of.

Each of said acts was committed pursuant to said plan, design, combination and conspiracy.

Consistently and continuously since on or about October 5, 1936, defendants have caused to be made, published and communicated to various persons, including:

International Broadcasting Company, having an office at 412 Pershing Square Building, Los Angeles, California.

Andres Chacon, having offices at Apartado Postal 1097, Mexico City, Republic of Mexico.

J. A. Murphy, having offices at 756 South Spring Street, Los Angeles, California.

The Government of said Republic, including its Department of Posts and Telegraphs, Division of Radio Communications.

Bank of the Pacific, a Mexican banking corporation having offices in the city of Tijuana in said territory and Republic,

The Chamber of Commerce of said city of Tijuana, and other persons, statements to the effect that defendants are the owners of said concession and radio station, that none of plaintiffs had any rights therein, and that defendants would file suit and take other legal steps against persons doing

business with any of plaintiffs with respect to said concession or said radio station.

On or about September 3, 1937, defendants caused to be filed that certain action in this Honorable Court entitled Lawrence W. Allen vs. M. P. Barbachano, et al, 8018-H, basing their action upon alleged rights of defendants against plaintiffs [9] herein, under and pursuant to said agreement; and thereafter and on or about the same date defendants caused attachment in said action to be issued and levied upon said materials, supplies, equipment and apparatus mentioned in paragraph XVIII, then and there being used in the construction of said radio station by plaintiffs. Thereafter and at or about the latter part of September, 1937, plaintiffs were compelled to and did expend approximately \$2300 to secure bond for the release of said attachment, pursuant to the order of court in said action. On or about April 20, 1938, this Honorable Court by its order duly given and made, held said attachment to be improper and void from the beginning, and on or about 1939 said action 8108-H was dismissed by order of this court for lack of prosecution. By reason of said action, the wrongful attachment therein and consequent delay of plaintiffs in the construction of said radio station, plaintiffs were damaged in the approximate amount of not less than \$25,000.

## XXII.

Each of the statements and allegations of defendants referred to in paragraph XXI above were and now are in all respects false.

By reason of such statements, allegations and acts of defendants, persons otherwise willing to extend necessary credit and to do business with plaintiffs with respect to said concession and said radio station, have been and are unwilling to do so until a final determination of the claims of defendants, and are further unwilling pending such determination to purchase the radio time and facilities of said radio station.

### XXIII.

By reason of the conduct of defendants as hereinabove set forth, plaintiffs have been damaged in the total amount of \$177,077.77. [10]

Plaintiffs have been further damaged, and will in the future be damaged by reason of said conduct of defendants, in an amount or amounts not presently known to plaintiffs, and plaintiffs ask leave of court to amend this complaint to insert said amount or amounts when same have been ascertained.

### XXIV.

By reason of the conduct of defendants as hereinabove alleged and the consequent inability of plaintiffs to commence operation of said radio station although presently and at all times since on or about February 15, 1940, able to do so, plaintiffs are daily incurring great damage and sustaining great loss of profits, and will continue to do so unless defendants are restrained as hereinafter set forth.

## XXV.

By reason of the acts of defendants in connection with the matters hereabove in this complaint set forth, plaintiffs and each of them are threatened with great immediate and irreparable injury to themselves and their property, and such injury threatens to impair in value any order favorable to plaintiffs herein, unless defendants are restrained pending notice and a hearing herein, and thereafter to and after final judgment herein, from making, publishing or communicating among themselves or other persons doing business or seeking to do business with plaintiffs, or any of them, such statements or any of the statements or allegations of defendants as specifically mentioned in paragraph XXI, or any other similar statements or allegations to the effect that defendants claim to be the owners or rightful owners of said concession or said radio station, or that plaintiffs have no rights therein, or that defendants will sue or take other legal steps against persons doing business with plaintiffs with respect to said concession or radio station, and further restraining defendants from any other [11] activities interfering in any way, directly or indirectly, with the ownership and operation of said radio station by Company 2 or any of its assignees, or interfering with persons doing business or seeking to do business with said company or owning or seeking to purchase stock in said Company 2.



## XXVI.

Plaintiffs have no adequate remedy at law for the reasons, in addition to those hereinabove set forth, that such remedy at law would require a mutiplicity of suits and, plaintiffs are informed and believe and on that basis allege, that defendants are financially incapable of responding in damages for their liability herein.

## Second Cause of Action

## I.

Plaintiffs refer to paragraphs I, II, III, IV, V, VI, and VII of the first cause of action and make them a part hereof.

## II.

At the time of entering into said agreement of March 30, 1936, and at all times thereafter defendants were unable to and at no time intended to perform said agreement.

## III.

Plaintiffs refer to paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XIX, XX, XXI, XXII, XXIII, XXIV, and XXV of the first cause of action and make them a part hereof.

## Third Cause of Action

## I.

Plaintiffs refer to paragraphs I, II, III, IV, V, VI, VII and IX of the first cause of action and make them a part hereof.

## II.

At, and at all times after said agreement of

March 30, [12] 1936, was entered into by the parties hereto, said agreement was void, contrary to the public policy of and impossible of performance under the laws and statutes of said Republic of Mexico, including among other laws and statutes, Articles 12 and 30 of the Laws of General Ways of Communication of said Republic enacted August 29, 1932, and Organic Law of Fraction I of Article 27 of the Constitution of said Republic as adopted by the Congress of the Mexican Union on December 31, 1925.

At all times until on or about 1937, the matters hereinabove in this paragraph mentioned, were not known to plaintiffs although plaintiffs were at all times acting with reasonable care in the premises.

By reason of the matters hereinabove in this paragraph mentioned, said agreement of March 30, 1936, was entered into under a material mistake of law and fact, to wit: excusable ignorance of the fact that said agreement was null, void and impossible of performance under the laws and statutes and public policy of said Republic.

### III.

At all times since on or about 1937 plaintiffs have considered said agreement as without binding force or effect upon plaintiffs and have at all times notified defendants accordingly.

### IV.

Plaintiffs refer to paragraphs XVI and XVIII of the first cause of action and make them a part hereof.

## V.

From on or about September 25, 1936, to on or about February 15, 1940, plaintiffs caused said radio station and lands, buildings and electric power facilities incident thereto to be constructed and completed at a cost to plaintiffs of approximately \$149,777.77. Said cost of \$149,777.77 was at all times and now is the reasonable value of said construction and completion. [13]

## VI.

Plaintiffs refer to paragraphs XX, XXI, and XXII of the first cause of action and make them a part hereof.

## VII.

By reason of the conduct of defendants as hereinabove set forth, plaintiffs have been damaged in the total amount of \$149,777.77. Plaintiffs have been further damaged, and will in the future be damaged by reason of said conduct of defendants, in an amount or amounts not presently known to plaintiffs, and plaintiffs ask leave of court to amend this complaint to insert said amount or amounts when same have been ascertained.

## VIII.

Plaintiffs refer to paragraphs XXIV, XXV, XXVI of first cause of action and make them a part hereof.

## Fourth Cause of Action

## I.

Plaintiffs refer to paragraphs I, II, III, IV, V, VI, VII, IX, XII, XIII and XVIII of the first cause of action and make them a part hereof.



## II.

Defendants have failed and refused to perform said agreement or comply with the conditions of said concession. By reason of such failure and refusal plaintiffs have been compelled to, and they have expended approximately \$122,777.77 in maintaining said concession in full force and effect, and constructing said radio station, which sum was at all mentioned times and is the reasonable value of such maintenance and construction. Plaintiffs have duly performed all of the terms and conditions of said agreement required to be performed by them and have duly complied with the conditions of said concession, including expenditure by plaintiffs of approximately \$27,000, in providing said suitable [14] lands and buildings and said electric power facilities, which sum was at all times mentioned and is the reasonable value of said suitable lands and buildings and said electric power facilities.

## III.

Plaintiffs refer to paragraph XX of the first cause of action and make them a part hereof.

## IV.

At all times since on or about February 19, 1940, performance of said agreement of March 30, 1936, was and is impossible and unlawful under the laws and statutes of the Republic of Mexico, including among others, Article 403 of the Laws of General Ways of Communications enacted February 19, 1940.

Promptly following the events hereinabove in this paragraph, plaintiffs notified and continue to notify defendants thereof.

## V.

By reason of the matters hereinabove in this cause of action set out, defendants are estopped and prohibited from claiming any rights in or to said concession, and suitable lands or buildings, said radio station or under said agreement.

## VI.

Plaintiffs refer to paragraphs XVI, XXI, XXII, XXIII, XXIV, XXV and XXVI of the first cause of action and make them a part hereof.

Wherefore, plaintiffs pray judgment as follows:

1. For a declaration of this Honorable Court declaring and adjudging plaintiff Radio Difusora Internacional, S. A., a corporation, to be the lawful owner and holder of said concession, said buildings and grounds, and said radio station at Rosarito Beach hereinabove in this complaint described, and declaring that none of the defendants has any right, title or interest in or [15] under said agreement of March 30, 1936, or said concession, or said lands and buildings, or said radio station.

2. That the preliminary injunction heretofore duly made and given by the court following issuance of temporary restraining order, be continued unchanged, and in full force and effect pending final judgment.

3. For a permanent injunction on final hearing

herein, enjoining defendants and each of them from doing any of the acts hereinabove in this complaint complained of.

4. For damages in favor of plaintiffs in the sum of \$174,777.77.

5. For plaintiffs cost of suit and such other relief as the court deems just.

HARDY & HORWIN,

By /s/ LEONARD HORWIN,

Attorneys for Plaintiffs.

Points and Authorities

48 U. S. Stats. 955, as amended

49 Stats. 1927

28 U. S. C. A. 400

Maytag Co. v. Meadows Mfg. Co.,

35 Fed. (2d) 403

28 U. S. C. A. 32; 36 Stats. 1091

California Civil Code; sections 1667, 1689 [16]

## EXHIBIT "A"

Cinema Advertising Agency  
Cinema Building, 1731 North Highland Avenue,  
Hollywood, California  
Gladstone 2191

March 30, 1936.

"M. M. P. Barbachano,  
Border Electric & Telephone Co.,  
P. O. Box 337, San Ysidro, Calif.

Gentlemen:

The following is the agreement between us:

1. We will agree to construct, at our own expense, at Rosarito Beach, a radio broadcast station that will have an effective signal power of not less than 50,000 watts.

2. We will commence the construction of the station within 30 days after the permit therefor has been granted; and we will agree to have the station on the air and operating within 120 days thereafter.

3. We will furnish without cost to you such time for the broadcast of music, floor shows, and other activities of Rosarito Beach as you can advantageously use for the purpose of advertising the resort and its activities, not to exceed however, 30 minutes in the morning, 30 minutes at noon, 30 minutes at 6 p.m. and 30 minutes at midnight every day.

4. We will agree that following the announce-

ment of the call letters of the station at least 20 times every day, the call letters will be followed by the announcement that the station is "located at beautiful Rosarito Beach in Lower California" or some such similar announcement as you might suggest.

5. In consideration of all the foregoing, you will agree to furnish us, without cost, suitable buildings and grounds to house the transmitter and studios, the use of suitable land for [17] towers for new antenna (the antenna will be of the peculiar shape and size which we have explained to you); you will furnish your services in obtaining the license or concession from the government which license or concession is to be issued in the name of the company hereinafter mentioned in paragraph 9 hereof. However, all deposits or fees required by the government in order to obtain said concession will be paid by us after you have actually procured the issuance thereof. If the license or concession costs no more for 100,000 watts of power than it costs for 50,000 watts of power, as we understand to be the fact, then the permit is to be obtained for 100,000 watts of power.

6. Also you will agree to sell and deliver electric power for the operation of the said station upon the following basis: 2c per kilowatt hour, of which sum we shall actually pay to you only the sum of 1c per kilowatt hour, and the other 1c per kilowatt hour shall be credited to your purchase of 20% of the ownership of the company hereinafter



mentioned in paragraph 9. After your stock ownership in the company shall have been completely paid in this manner, you will agree to continue to sell and deliver electrical power for the operation of the station at two cents per kilowatt hour.

7. The term of this contract shall be for five years from the date hereof, and at our option, may be renewed from year to year for fifteen consecutive renewals.

8. It is understood, however, that the frequency upon which this station operates, and for which the license is to be granted, shall be one that is mutually agreeable. 730 kilocycles is an acceptable frequency at this time; if that frequency cannot be obtained then possibly we may designate some other frequency that would be acceptable.

9. In addition to the compensation that you are to receive in the way of advertising of Rosarito Beach on this radio station, [18] we agree to allow you to have organized for us at your own expense a suitable corporation, under the laws of Mexico, and to allow you to purchase 20% of the ownership of said company for a sum equal to 20% of the amount which is invested in said radio station for equipment and services necessary to eventually make the station a 100,000 watt station. You are to be allowed to pay for this 20% of the stock of said company by crediting to your payment therefor 1c per kilowatt hour in accordance with the provisions of paragraph 6 hereof. The remaining 80% of the stock of said company will be issued in the name

of our nominees. The management of policy of operation of the said station shall be left entirely to our discretion. The books and records showing the business of the station shall always be open for your inspection. We make no guarantee or representation as to how much the earnings of the station are expected to be; and the inducement to you to enter into this contract is the advertising which Rosarito Beach will receive from this station. Any dividends paid on the 20% of the stock issued to you will be credited on the purchase price of your stock until paid for, and the sums so credited will actually be paid to the other 80% of the stock until your stock is paid for.

Very truly yours,

CINEMA ADVERTISING  
AGENCY,

By /s/ LAWRENCE W. ALLEN.

Accepted:

M. P. BARBACHANO,  
Border Electric & Telephone Co.

By /s/ M. P. BARBACHANO.

We will also execute a contract to this same effect that will be legal in Baja California. When the corporation mentioned in paragraph 9 is organized you will be named as vice-president.

/s/ M. P. BARBACHANO,

CINEMA ADVERTISING  
AGENCY,

By /s/ LAWRENCE W. ALLEN. [19]

State of California,  
County of Los Angeles—ss.

Leonard Horwin, being duly sworn, says: That he is one of the attorneys for plaintiffs; that the facts in the above-entitled action are within his personal knowledge; that plaintiffs are unable to make the verification because they are absent from said County and for that reason affiant makes the verification on plaintiffs' behalf; that he had read the foregoing Amended Complaint of Plaintiffs, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

/s/ LEONARD HORWIN.

Subscribed and sworn to before me this 3rd day of June, 1940.

[Seal]     /s/ INEZ INGRAM,

Notary Public in and for Said  
County and State.

[Endorsed]: Filed June 4, 1940.



[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANTS  
LAWRENCE W. ALLEN, WILLIS ALLEN,  
CINEMA ADVERTISING AGENCY, AND  
M. M. DEXTER AND COUNTER-CLAIM.

To the Honorable the Judges of the District Court  
Of the United States for the Southern District  
Of California, Central Division:

Defendants Lawrence W. Allen, Willis Allen,  
Cinema Advertising Agency, and M. M. Dexter ap-  
pearing and severally answering the amended com-  
plaint of the plaintiffs, admit, deny and allege as  
follows:

I.

First Defense

1. The first count of the plaintiffs' amended complaint fails to state a claim in favor of either of the plaintiffs against these defendants or either of them upon which relief can be granted.

2. The second count of the plaintiffs' amended complaint fails to state a claim in favor of either of the plaintiffs against these defendants or either of them upon which relief can be granted.

3. The third count of the plaintiffs' amended complaint fails to state a claim in favor of either of the plaintiffs against these defendants or either of them upon which relief can be granted.

4. The fourth alleged cause of action of the plaintiffs' amended complaint fails to state a claim

in favor of either of the plaintiffs against these defendants or either of them upon which relief [22] can be granted.

## II.

### Second Defense

1. As to paragraphs I, II, V, VI, X, XVII, XVIII, XIX, and XXX, of plaintiffs' amended First Cause of Action, these defendants and each of them allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs of plaintiffs' amended complaint and upon that ground deny the same and call for strict proof thereof.

## III.

### Third Defense

1. These defendants and each of them admit all of the allegations of paragraph VII except that they deny that on or about July, 1936, or at any other time or at all these defendants or either of them agreed either in writing or otherwise that paragraph V of the Agreement mentioned should be modified so that the concession therein mentioned should be issued in the name of M. P. Barbachano instead of to a company.

2. Admit the allegations of paragraph VIII of the plaintiffs' amended complaint except that they deny that defendants would be required to expend not less than One Hundred Twenty Thousand

(\$120,000.00) Dollars to construct said radio station under the agreement.

3. Answering paragraph IX defendants and each of them deny that a concession was issued on or about September 25, 1936, but admit that the concession was issued to M. P. Barbachano on August 31, 1936 for the defendants herein.

4. Deny each and all of the allegations of paragraph XI of plaintiffs' amended complaint.

5. Defendants severally deny each and every allegation contained [23] in paragraphs XII, XIII, XIV, XV, XVI, and XXI of plaintiffs' amended complaint excepting that these defendants admit they did notify International Broadcasting Company, Andres Chacon, J. A. Murphy, Government of the Republic including its Departments of Post and Telegraphs, Division of Radio Communications, the Bank of the Pacific, and a Mexican banking corporation at Tijuana, that they were the owners of the radio station and the concession and that neither of the plaintiffs had any right therein; excepting as to Paragraph XXI they admit that defendants filed action No. 8018-H in this honorable court and that they procured an attachment to be issued and levied upon the materials, supplies, equipment, and apparatus mentioned in Paragraph XIII, but deny that said attachment was dissolved by order of court and deny that a wrongful attachment was issued at all or that plaintiffs were damaged in the approximate amount of Twenty-five thousand (\$25,000.00) Dollars or in any amount or at all.

These defendants also deny all of the allegations of Paragraphs XXII, XXIII, XXIV, XXV, and XXVI.

#### IV.

##### Fourth Defense

To the Second and Separate Cause of Action of Plaintiffs' Complaint:—

1. Defendants replead and repeat their answer of admissions and denials to paragraphs I to VII both inclusive of plaintiffs' amended First Cause of Action.

2. Deny each and every allegation contained in Paragraph II of plaintiffs' amended Second and Separate Cause of Action.

3. Defendants repeat and replead their answers above set forth to paragraph VIII to XXV both inclusive of plaintiffs' amended First Cause of Action to paragraph III of plaintiffs' amended Second Cause of Action. [24]

#### V.

##### Fifth Defense

To Amended Third and Separate Cause of Action:

1. Defendants repeat and replead their answer of denials and/or admissions, to the First to Seventh paragraphs both inclusive of plaintiffs' amended First Cause of Action, but that defendants admit the allegations of Paragraph IX of plaintiffs' amended first Cause of Action except that they deny that the concession was issued on September 25, 1936.

2. Deny each and every of the allegations of paragraphs II, III, & IV of the plaintiffs' amended further Third and Separate Cause of Action.

3. As to the allegations of paragraph V of the plaintiffs' amended Third and Separate Cause of Action these defendants say that they have no knowledge or information sufficient to constitute a belief as to the truth of allegations contained in said paragraph and upon that ground deny each and every of said allegations and call for strict proof thereof.

Defendants repeat and replead their answer of denials and/or admissions to paragraphs XX, XXI, and XXII of the First Cause of Action in answer to paragraph VI of plaintiffs' amended Third and Separate Cause of Action.

Deny each and every of the allegations of Paragraph VII of plaintiffs' amended Third and Separate Cause of Action.

4. Defendants repeat and replead their answer of denials and/or admissions to paragraphs XXIV, XXV, and XXVI of plaintiffs' amended First Cause of Action and make such denials and/or admissions a part of their answer to paragraph VIII of plaintiffs' amended and separate Third Cause of Action.

## VI.

### Sixth Defense

To Plaintiffs' Amended Fourth and Separate Cause of Action

1. Defendants repeat and replead their answer



of denials [25] and admissions contained in their answer to the allegations of paragraphs I, II, III, IV, V, VI, VII, IX, XII, XIII, XVIII of plaintiffs' amended first Cause of Action in answer to paragraph I of plaintiffs' amended Fourth Cause of Action.

2. Defendants deny each and every of the allegations of paragraphs II, IV, and V of the Fourth Cause of Action of plaintiffs' amended complaint.

Defendants refer to, repeat, and replead their answer of denials and/or admissions contained in their answer to the allegations of paragraph XX of plaintiffs' amended First Cause of Action and make them a part hereof in answer to paragraph III of plaintiffs' amended Fourth Cause of Action.

Defendants refer to, repeat, and replead the answer of denials and/or admissions contained in their answer to the allegations of paragraphs XVI, XXI, XXII, XXIII, XXIV, XXV, and XXVI of plaintiffs' amended First Cause of Action, in answer to paragraph VI of the Fourth Cause of Action of plaintiffs' amended complaint.

## VII.

### Seventh Defense

That the plaintiffs are estopped to claim in their amended complaint that the defendants failed and refused to make the deposit of bond of 10,000 pesos to the Mexican Government and plaintiffs are estopped to claim that defendants were unable to and or never intended to construct said radio station, for the reason that plaintiffs concealed the date of

the issuance of the concession and the time within which the 10,000 pesos bond was required to be filed and by reason of the service upon defendants by the plaintiffs of a Notice of Rescission on October 5, 1936, and by reason of the filing of such bond by the plaintiff prior to the expiration of the time within which the defendants were required to so file said bond. [26]

## VIII.

### Eighth Defense

That the plaintiffs are estopped to claim in their amended complaint that the contract of March 30, 1939, by and between plaintiffs and defendants was broken and violated by the alleged failure of the defendants to construct the radio station at Rosarito Beach, by reason of the fact that the plaintiffs refused to turn over to a Sociedad Anonima, a corporation to be formed by the defendants, the radio concession issued by the Mexican Government on October 31, 1936, to M. P. Barbachano as the agent for the defendants; by an unlawful demand of the plaintiffs that the defendants give plaintiffs a bond in the sum of Ninety Thousand (\$90,000.00) Dollars not provided for in the contract of the plaintiffs and defendants for the construction of said radio station; that the plaintiffs are further estopped to claim that the said contract of March 30, 1936, by and between the plaintiffs and defendants was broken and violated by the defendants by reason of the fact that plaintiffs served a Notice of Rescission of said contract upon defendants on October 5, 1936,

and by reason of the fact that the plaintiffs themselves entered upon the construction of said radio station and excluded defendants from the premises and prevented them from entering upon said premises and constructing said radio station.

## IX.

### Ninth Defense

That the plaintiffs have waived that portion of the contract of March 30, 1936, which required the defendants to file bond with the Mexican Government in the sum of 10,000 pesos by concealing from the defendants the date of the issuance of said concession and the time within which said bond was required to be filed; by serving a Notice of Rescission of said contract of March 30, 1936, on October 5, 1936, before the time had expired within which the defendants were required to file said bond, and that plaintiffs [27] have further waived said portion of the contract of March 30, 1936, by themselves filing said bond before the time had expired within which the defendants were required to file the same.

## X.

### Tenth Defense

That the plaintiffs have waived right to claim and to assert that the defendants have violated and broken the contract of March 30, 1936, by failing and refusing to construct said radio station within the time provided in said contract, for the reason that the plaintiffs have concealed from said defend-



ants the date of the issuance of said radio concession, have made an unlawful and illegal demand upon defendants to furnish to plaintiffs a bond in the sum of Ninety Thousand (\$90,000.00) Dollars for the construction of said station, by plaintiffs' failure to turn over to Sociedad Anonima, the concession obtained from the Mexican government on August 31, 1936; by the serving upon the defendants of the Notice of Rescission of said contract of March 30, 1936, on October 5, 1936, and by the plaintiffs themselves constructing and entering upon the construction of said radio station before the expiration of the time within which the defendants were required by the contract of March 30, 1936, to construct the same, and by excluding defendants from the premises upon which the said radio station was to be constructed.

These Defendants by Leave of Court First Had in the Premises File This Their Amended Counter-Claim Against Plaintiffs M. P. Barbachana, R. S. Barbachano, the Border Electric and Telephone Co., Inc., a Corporation, Radio Difusora Internacional S. A., a Corporation, and for Cause of Action Allege:

### I.

At all times herein mentioned the plaintiff, Border Electric and Telephone Company, Inc., has been and now is a corporation duly organized, existing and authorized to do business under and [28] pursuant to the laws and the statutes of the Republic of Mexico; that said corporation was organized by,

is solely controlled by, and a majority of its capital stock is held by the plaintiffs, M. P. Barbachano and R. S. Barbachano.

Plaintiff, Radio Difusora Internacional, S. A., now is and at all times herein mentioned was a corporation organized, existing and authorized to do business under and pursuant to the laws and statutes of the Republic of Mexico; that the said corporation was organized by the plaintiff, M. P. Barbachano and R. S. Barbachano, for the purpose of taking over title to the concession and the radio station and equipment, and for the operation of the radio station at Rosarito Beach in the territory of Baja California; that its stock was to be issued and held in accordance with the provisions of the contract of March 30, 1936, between the parties herein; that defendants are informed and believe and so allege that when said Radio Difusora Internacional, S. A., had been incorporated and was organized, its capital stock was issued to M. P. Barbachano and R. S. Barbachano and that they are now holders of its issued capital stock and that said corporation is merely the alter ego of M. P. Barbachano and R. S. Barbachano, plaintiffs;

That the defendants and counter claimants Lawrence W. Allen, Willis Allen, and M. M. Dexter now are and at all times herein mentioned have been citizens and residents of the State of California, United States of America and of the Southern District and Central Division of the District Court of the United States; that the Defendant, Cinema Advertising Agency is the fictitious name of an adver-

tising business solely owned and controlled by Willis Allen and M. M. Dexter; that a certificate of said fictitious name has been duly filed in the County Clerk's office in the County of Los Angeles, State of California. [29]

## II.

That on March 30, 1936, a certain agreement in writing was entered into by and between the defendants, Cinema Advertising Agency, Lawrence W. Allen, Willis Allen and M. M. Dexter on the one part to and with M. P. Barbachano, R. S. Barbachano, and Border Electric and Telephone Company, Inc., a corporation, on the other part, whereby it was agreed that a concession for a radio station was to be obtained from the Mexican government through the services and efforts of the said M. P. Barbachano and Border Electric and Telephone Company, Inc., a corporation; that said concession was to be issued in the name of a Mexican corporation to be formed thereafter and that the defendants were to pay all deposits and fees required by said Republic of Mexico for the issuance of said concession or license; that the said M. P. Barbachano and the Border Electric and Telephone Company, Inc., a corporation, were to furnish suitable buildings and grounds at Rosarito Beach in Baja California to house the said radio station, its parts, and equipment and that said Barbachanos and The Border Electric and Telephone Company agreed to sell and deliver electric power for the operation of said radio station.

## III.

That on or about August 31, 1936, pursuant to the provisions of said contract a concession or franchise was issued by the Mexican government, and that the said M. P. Barbachano caused said concession and license to be issued in his own name; that defendants paid the costs and fees for the issuance of said concession in the sum of Seventeen Hundred (\$1700.00) Dollars and thereupon demanded that said concession be placed in the name of a corporation to be formed as provided in said contract of March 30, 1936; that plaintiffs refused to turn over said concession and demanded that defendants furnish plaintiffs a bond in the sum of Ninety Thousand (\$90,000) Dollars that [30] defendants would actually construct said station; that the contract of March 30, 1936, did not require defendants to execute or deliver a bond for the construction of the radio station nor had defendants ever agreed so to do; that plaintiffs knew at the time of making said demand that defendants had already contracted with a radio engineer to construct said station and had paid a part of the contract price and cost and that defendants intended to and were able to complete said station within the time and in compliance with contract requirements; that said demand of plaintiffs was made in bad faith and pursuant to an illegal and fraudulent conspiracy to deprive defendants of their rights and interests in and to said concession and radio station and the profits and emoluments arising out of its operation.



## IV.

That said concession was issued by the Mexican government on August 31, 1936; that it contained a provision that the concessionaire was to furnish a bond to the Republic of Mexico in the sum of 10,000 pesos within fifteen days from the date of the concession; that plaintiffs concealed from defendants the date of issuance of the concession and the time within which bond was to be furnished until October 3, 1936 that when defendants learned of the concealment they complained that the time had already elapsed whereupon plaintiffs claimed that they had secured an extension to and including October 5, 1936; that when defendants stated that they were then ready, able and willing to furnish a bond to the Mexican government in the amount of 10,000 pesos, plaintiffs refused to turn over the concession until another and additional bond in the sum of Ninety Thousand (\$90,000) Dollars had been given them for the construction of the radio station; that thereafter and before the expiration of the date within which said bond to the Mexican government was to be given under said extension of time, the plaintiffs served these [31] defendants with a Notice of Rescission of the said contract of March 30, 1936.

That defendants were prevented from filing said bond in the sum of 10,000 pesos with the Mexican government by the concealment, misrepresentation, fraud, act of rescission of the plaintiffs and the illegal demand of the said plaintiffs for a further and additional bond of Ninety Thousand (\$90,000) Dollars to them not provided for or required by the

contract of March 30, 1936; that defendants were ready, able and willing at all times to perform all of the acts and things required of them by the contract of March 30, 1936, but were prevented from so doing by the acts of the plaintiffs aforesaid.

## V.

That shortly after the execution of the contract of March 30, 1936, and on or about August 31, 1936, plaintiffs M. P. Barbachano, R. S. Barbachano, and Border Electric and Telephone Company, Inc., did unlawfully, wilfully, and fraudulently conspire, confederate, and combine together to deprive the defendants and each of them of their property and rights in and to the contract of March 30, 1936, in and to the concession of August 31, 1936, granted by the Mexican government and in and to the radio station and corporation to be formed to operate said station and in and to the good will, profits, earnings, and emoluments derived and to be derived from the operation of said station and the corporation holding the title thereto; that in pursuance of such unlawful and fraudulent combination, conspiracy and confederacy, plaintiffs did cause said concession to be issued in the name of M. P. Barbachano and did refuse to transfer the same to a corporation to be formed in accordance with the contractual obligation and did conceal from defendants the time within which a certain bond to the Mexican government was to be filed and did make certain conditions and demands [32] upon defendants which were unconscionable and not warranted by any provision or



requirement of the contract of March 30, 1936, and did prevent the defendants from forming a corporation and receiving the transfer of said concession to said corporation.

## VI.

That immediately after obtaining said concession from the Mexican Government the plaintiffs in pursuance of the conspiracy aforesaid represented themselves to be the owners of said concession and negotiated with a number of persons to purchase the same and to exclude defendants from all interest therein and from obtaining the said concession and from building the radio station and organizing the company for the operation thereof; that in further pursuance of such conspiracy aforesaid plaintiffs demanded of defendants that they execute a bond in the sum of Ninety Thousand (\$90,000.00) Dollars before the concession would be turned over to them or to their nominees. That such a bond was not required by the contract of March 30, 1936, or by no modification thereof and was demanded by plaintiffs to prevent the defendants from obtaining the concession or proceeding with the construction of the station and of performing their part of the contract of March 30, 1936.

## VII.

That by reason of the acts of plaintiffs hereinbefore set forth in pursuance of the unlawful conspiracy aforesaid the defendants have been deprived of the radio station and the corporation to operate it and of the earnings, profits, emoluments of said radio station provided for in the contract of March

30, 1936, from approximately January 1, 1937, to the present time amounting to the sum of Five Hundred Thousand (\$500,000.00) Dollars.

### VIII.

That by reason of the acts of the plaintiffs in connection with the matters hereinbefore in this counter claim set forth and each of them, defendants and counter claimants, have suffered [33] great damage and injury and will continue to suffer immediate, continuing and irreparable damage and injury to themselves, their property, and their rights; that the plaintiffs M. P. Barbachano, R. S. Barbachano and the Border Electric and Telephone Company have transferred and assigned to the Radio Difusora Internacional, S. A., a Mexican corporation, all of their right, title and interest in and to the contract of March 30, 1936, and in and to the concession obtained thereunder and in and to the radio station heretofore constructed at Rosarito Beach, Mexico; that the plaintiff, Radio Difusora Internacional, S. A., a corporation, has accepted said assignment, now holds the concession, the radio station in its name and in consideration of said transfer and assignment has transferred to M. P. Barbachano and R. S. Barbachano all of its capital stock and full control, management, and operation of said Difusora Corporation; that said corporation is merely the alter-ego of M. P. Barbachano and R. S. Barbachano; that said corporation had full knowledge of the circumstances under which the concession was issued to M. P. Barbachano that said M. P. Barba-

chano was merely the trustee and agent for the defendants herein and for the corporation to be formed by them, of the rights of the defendants in and to said concession and to the radio station to be constructed under said concession and that the said Radio Difusora Internacional, S. A., entered into the said conspiracy with the said M. P. Barbachano, R. S. Barbachano, and the Border Electric and Telephone Company, a corporation, to deprive the defendants of their interest in said concession and radio station; that the said Radio Difusora Internacional, S. A., a corporation, now holds the said concession and radio station as a constructive trustee for the defendants.

### IX.

That the plaintiffs have been operating said radio station at Rosarito Beach ever since February, 1940, and have been and are [34] receiving large returns and profits therefrom; that defendants are informed and believe that said profits, returns and proceeds from the operation of said station amount to a very great sum of money the exact amount of which these defendants have not been able to ascertain; that defendants are entitled to an accounting for all such profits, earnings, and emoluments and to a judgment therefor against the plaintiffs; that the plaintiffs are holding all of the profits, returns, proceeds, and emoluments from the operation of said radio station and concession as constructive trustees for the defendants and that defendants are entitled to a judgment for the turning over of said sums of money when ascertained.

## X.

That the plaintiffs are now operating said concession and radio station and are appropriating to their own use all of the proceeds, profits, and earnings thereof; that they intend to continue to operate said concession and station and to appropriate to their own use the profits and earnings thereof; that unless an injunction issues restraining and enjoining the plaintiffs from retaining possession of said radio station and concession; from refusing to transfer to the defendants the said concession, radio station and equipment thereof; from withholding from defendants and refusing to transfer to them or to their nominees a stock interest in the Radio Difusora Internacional S. A. equal to 80% of the total stock issue of said corporation and from excluding the defendants or their nominees from the premises, buildings, operating equipment and control, management and operation of said radio station and from said concession, the defendants may be irreparably damaged and injured; that no adequate remedy at law exists in favor of the defendants herein; that said property and premises and the concession and the radio station operating said concession are located in the Republic of Mexico and that the judgment of [35] a court of law and the process issued to enforce such judgment at law would be wholly ineffective in said Republic of Mexico; that the plaintiffs are financially incapable of responding in damages for their liabilities herein.

These defendants allege that they are informed and believe and so allege that the plaintiffs have



threatened to and may dispose of and sell the said concession, radio station and equipment and transfer out of their hands all of the stock in the Radio Difusora Internacional S. A., a corporation; that they have approached and negotiated with various persons, both American and Mexican, in an attempt to sell such station and concession to them; that they have made contact with divers persons to sell to them said concession and radio station and that unless an injunction issues herein restraining and enjoining said plaintiffs from selling, assigning, disposing of or incumbering, hypothecating or mortgaging said concession, the radio station or 80% of the stock in said Radio Difusora Internacional S. A., a corporation, held by the said plaintiffs, these defendants will suffer great loss and irreparable injury.

## XI.

That these defendants have done and performed all acts required of them under the contract which were not prevented by the acts of the plaintiffs as aforesaid; that they are entitled to a decree of specific performance requiring the plaintiffs to execute the contract of March 30, 1936, and to transfer to the defendants or their nominees the aforesaid radio concession, the radio station at Rosarito Beach and all of its operating equipment and 80% of the stock of the Radio Difusora Internacional S. A., a corporation; that defendants are willing and here offer to allow plaintiffs credit in the total amount of the cost of construction of the radio station at Rosarito Beach and of the installation of its equipment as

against any claim for damages, profits or [36] proceeds that may be due and coming to the defendants under any judgment or decree entered herein.

Wherefore, defendants demand judgment:—

1. For a declaration of this honorable court declaring and decreeing that M. P. Barbachano received and held said concession as trustee for defendants and that the defendants were and now are the true owners of the concession nominally issued to M. P. Barbachano on August 31, 1936, for the proposed radio station at Rosarito Beach, Mexico, and of the radio station and operating equipment constructed and operated at Rosarito Beach and of the grounds, premises, buildings, and appurtenances at said Rosarito Beach upon which the said radio station is located; that the said Radio Difusora Internacional S. A., a corporation, received and held and now holds said concession and the said radio station operating said concession and the lands, premises, buildings, and appurtenances upon which the said radio station is constructed and located as constructive trustee for the defendants.

2. That plaintiffs M. P. Barbachano, R. S. Barbachano, and The Border Electric and Telephone Company hold all the capital stock received by them or either of them from the Radio Difusora Internacional S. A., a corporation, as trustees for defendants or their nominee.

3. For an accounting of all moneys, profits, and earnings, earned and received by the said Radio



Difusora Internacional S. A., a corporation, and the plaintiffs from the operation of said radio station since it began broadcasting and for a judgment and decree requiring the plaintiffs to pay to defendants all such profits, earnings, receipts and moneys after first deducting therefrom the reasonable cost of construction and installation of said radio station, the cost of the initial bond to the Mexican Government and all operating costs of said station. [37]

4. For a decree requiring plaintiffs to specifically perform the terms of the contract of March 30, 1936.

(a) For a judgment and decree requiring the Radio Difusora Internacional S. A., a corporation and plaintiffs to transfer to defendants or their nominee 80% of the stock of the Radio Difusora Internacional S. A., or in lieu thereof to transfer and assign to defendants all right, title, and interest in and to the concession issued on August 31, 1936, and all right, title and interest in and to the Radio station and its operating equipment and the grounds, lands, buildings and appurtenances on which said station is located, to be used under the order of this court and in accordance with the terms and provision of the contract of March 30, 1936.

5. For a decree quieting the title to said concession and radio station, its operating equipment and the lands, buildings and appurtenances upon which said radio station is situated at Rosarito Beach in such Mexican Corporation as is provided to be formed in said contract of March 30, 1936, or

in the Radio Difusora Internacional S. A., a corporation, when the said Radio Difusora Internacional S. A., a corporation and the plaintiffs shall have issued and transferred to the defendants or their nominee 80% of its capital stock as provided in said contract of March 30, 1936.

6. For a judgment against plaintiffs for withholding the said concession from defendants and preventing them from constructing the radio station at Rosarito Beach and operating the same from January 1, 1937 to date amounting to the sum of Five Hundred Thousand (\$500,000.00) Dollars.

7. For a permanent injunction, and pending the hearing hereof for a restraining order and temporary injunction, restraining and enjoining said plaintiffs, their servants, agents, employees, and persons associated with them from selling, assigning or disposing of and from incumbering, hypothecating or mortgaging said concession, the radio station operating said concession, and 80% of the [38] stock in the said Radio Difusora Internacional S. A., a corporation. That upon a hearing hereof an injunction may issue restraining and enjoining the plaintiffs, their servants, agents, employees and persons associated with them from retaining possession of said concession and radio station and operate the same; from refusing to transfer to defendants the said concession, radio station and operating equipment thereof; from withholding from defendants and refusing to transfer to them or to their nominee a stock interest in the Radio Difusora Internacional

S. A., a corporation equal to 80% of the total stock issue of said corporation; from excluding the defendants or their nominee from possession of the premises, lands, buildings and appurtenances, the operating equipment and control, management and operation of said radio station and from the concession granted to operate said radio station.

8. That the defendants may have a judgment for their costs herein and a decree for such other and further relief as the nature of their case may require and to this Honorable Court shall seem meet.

/s/ WILLIAM SCHREIDER,  
Attorney for defendants and  
counter-claimants.

Duly verified.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 25, 1940. [39]

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[Title of District Court and Cause.]

PETITION FOR LEAVE TO FILE AMEND-  
MENT TO AMENDED COMPLAINT AND  
AMENDMENT TO PLAINTIFFS' REPLY  
TO DEFENDANTS' AMENDED COUNTER-  
CLAIM

Pursuant to Rule 15, Subdivision (a) of Rules of Civil Procedure for the District Courts of the United States, plaintiffs respectfully show that:

In their "Memorandum of Points and Authorities to Show that Plaintiffs are not Entitled to Introduce Evidence on the Subject of

Defendants Financial Resources'' defendants complain that plaintiffs' pleading herein is not sufficient fairly to apprise defendants of the charge of fraud.

Depositions of the defendants, Lawrence W. Allen and Willis Allen, and of their witness, W. H. Kindig, taken by plaintiffs on May 13, 1941, pursuant to the order of court duly made at pre-trial hearing, further confirm the validity of the charge of fraud heretofore made by plaintiffs, and furnish additional information concerning the issue created by the charge and denial thereof. Because of the importance of said issue of fraud, plaintiffs, while continuing to deny the validity of defendants' contention in their said memorandum, nevertheless desire to amplify their charge of defendants' fraud by the amended pleadings hereunto attached, so as to leave no room for further contention as to sufficiency of said pleadings, and so as to give defendants every opportunity to meet the evidence offered by plaintiffs.

Wherefore, plaintiffs respectfully pray that the court [54] make its order granting plaintiffs leave to file the attached amendment to plaintiffs' amended complaint and amendment to plaintiffs' reply to defendants' amended counter-claim.

Respectfully submitted,

HARDY & HORWIN,

By /s/ LEONARD HORWIN,

Attorneys for Plaintiffs.

Dated: May 19th, 1941.

ORDER

It is ordered that plaintiffs may file amendment to amended complaint and amendment to reply to the amended counterclaim as prayed for herein, and that defendants may have until May 26, 1941, to answer said amendment to the amended complaint.

May 20, 1941.

/s/ H. A. HOLLZER,  
Judge. [55]

[Title of District Court and Cause.]

AMENDMENT TO PLAINTIFFS'  
AMENDED COMPLAINT

Pursuant to the order of Court heretofore duly granting leave to plaintiffs, plaintiffs herewith amend their amended complaint by adding thereto a fifth cause of action as follows:

Fifth Cause of Action

I.

Plaintiffs refer to Paragraphs I, II, III, IV, V, VI and VII of the first cause of action and make them a part hereof.

II.

Prior to, at the time of entering into and at all times subsequent to said agreement of March 30, 1936, until on or about September 25, 1936, defendants then and there represented and stated to plain-



tiffs that defendants were ready and financially able to pay the cost of procuring said concession and of constructing said radio station, and further represented and stated that they then and there had sufficient assets on hand to enable them to pay for said cost of procurement and construction out of their own funds.

### III.

Plaintiffs relied upon the defendants' representations and statements mentioned in Paragraph II hereof at all times until [56] on or about September 25, 1936, and would not have entered into said agreement of March 30, 1936, with defendants in the absence of said representations and statements of defendants.

### IV.

At all times mentioned in this cause of action each of said representations and statements set forth in Paragraph II hereof were false and known by defendants to be false, and the true facts at all said times were that defendants were not ready or able to pay for the cost of procurement of said concession and of constructing said radio station and did not have on hand sufficient, or any, assets necessary to pay said cost of procurement and construction.

### V.

Plaintiffs refer to Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV and XXV of



the first cause of action and make them a part hereof.

Respectfully submitted,

HARDY & HORWIN,

By LEONARD HORWIN,

Attorneys for Plaintiffs.

Dated: May 19th, 1941. [57]

[Title of District Court and Cause.]

PLAINTIFFS' AMENDMENT TO THEIR  
REPLY TO DEFENDANTS' AMENDED  
COUNTER-CLAIM

Pursuant to the order of Court heretofore duly granting leave to plaintiffs, plaintiffs herewith amend their Reply to Defendants' Amended Counter-Claim by adding thereto a Seventh, Separate and Affirmative Defense.

Seventh Defense

I.

Plaintiffs refer to Paragraphs I, II, III, IV, V, VI and VII of the first cause of action of their amended complaint and incorporate said paragraphs herein.

II.

Prior to, at the time of entering into and at all times subsequent to said agreement of March 30, 1936, until on or about September 25, 1936, defend-

ants then and there represented and stated to plaintiffs that defendants were ready and financially able to pay the cost of procuring said concession and of constructing said radio station, and further represented and stated that they then and there had sufficient assets on hand to enable them to pay for said cost of procurement and construction out of their own funds.

### III.

Plaintiffs relied upon the defendants' representations and [58] statements represented in Paragraph II hereof at all times until on or about September 25, 1936, and would not have entered into said agreement of March 30, 1936, with defendants in the absence of said representations and statements of defendants.

### IV.

At all times mentioned in this defense each of said representations and statements set forth in Paragraph II hereof were false and known by defendants to be false, and the true facts at all said times were that defendants were not ready or able to pay for the cost of procurement of said concession and of constructing said radio station and did not have on hand sufficient, or any, assets necessary to pay said cost of procurement and construction.

### V.

Plaintiffs refer to Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV and XXV of the

first cause of action of their amended complaint and incorporate said paragraphs herein.

Respectfully submitted,

HARDY & HORWIN,

By LEONARD HORWIN,

Attorneys for Plaintiffs.

Dated: May 19th, 1941.

[Endorsed]: Filed May 20, 1941. [59]

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[Title of District Court and Cause.]

AMENDMENT TO PLAINTIFFS'  
AMENDED COMPLAINT

Pursuant to the order of Court heretofore duly granting leave to plaintiffs, plaintiffs herewith amend their amended complaint by adding thereto a fifth cause of action as follows:

Fifth Cause of Action

I.

Plaintiffs refer to Paragraphs I, II, III, IV, V, VI and VII of the first cause of action and make them a part hereof.

II.

Prior to, at the time of entering into and at all times subsequent to said agreement of March 30, 1936, until on or about September 25, 1936, defendants then and there represented and stated to plaintiffs that defendants were ready and finan-

cially able to pay the cost of procuring said concession and of constructing said radio station, and further represented and stated that they then and there had sufficient assets on hand to enable them to pay for said cost of procurement and construction out of their own funds.

### III.

Plaintiffs relied upon the defendants' representations and statements mentioned in Paragraph II hereof at all times until [61] on or about September 25, 1936, and would not have entered into said agreement of March 30, 1936, with defendants in the absence of said representations and statements of defendants.

### IV.

At all times mentioned in this cause of action each of said representations and statements set forth in Paragraph II hereof were false and known by defendants to be false, and the true facts at all said times were that defendants were not ready or able to pay for the cost of procurement of said concession and of constructing said radio station and did not have on hand sufficient, or any, assets necessary to pay said cost of procurement and construction.

### V.

Plaintiffs refer to Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV and XXV of

the first cause of action and make them a part hereof.

Respectfully submitted,

HARDY & HORWIN,

By /s/ LEONARD HORWIN,  
Attorneys for Plaintiffs.

Dated: May 19th, 1941.

[Endorsed]: Filed May 20, 1941. [62]

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[Title of District Court and Cause.]

## MEMORANDUM OF CONCLUSIONS

September 17, 1941

Judge Hollzer.

It appearing that this cause was tried upon the issues raised by the amended complaint, the amendment thereto, the answer to said amended complaint and to said amendment thereof, the amended counterclaim, the reply to said amended counterclaim and the amendment to said reply, subject to certain modifications all as more particularly stated in the pre-trial order filed herein; and

It further appearing that at the trial of this cause the defendants abandoned all claims to equitable relief, including specific performance, and have limited the affirmative relief herein sought by them to the remedy of damages for alleged breach by the plaintiffs of the contract hereinafter mentioned; and



It further appearing that the respective parties have stipulated to and otherwise admitted certain facts, all as more particularly set forth in said pre-trial order; and

It further appearing that under date of March 30, [71] 1936, plaintiffs M. P. Barbachano and Border Electric and Telephone Co. entered into a certain written contract with defendants Lawrence W. Allen, Willis Allen and M. F. Dexter, said contract having been signed on behalf of said defendants under the name of Cinema Advertising Agency by said Lawrence W. Allen, a copy of which said contract is attached to the complaint and marked Exhibit A therein; and

It further appearing that said contract was prepared by said defendants and that subsequent to the execution thereof the same was modified so as to provide that the concession therein mentioned might be obtained in the name of said M. P. Barbachano and thereafter transferred by him to the corporation mentioned in Paragraph 9 of said contract; and

It further appearing that during the negotiations leading up to the execution of said contract, also at the time of entering into the same and from time to time thereafter up until the early part of October, 1936, said defendants repeatedly represented to said plaintiffs that they were financially able and ready to pay the cost of procuring the radio concession from the Mexican government mentioned in said contract, also to provide all deposits or equivalent bonds required in con-

nection with such concession, and also to pay the cost of constructing, erecting and installing the radio station described in said contract, including all drawings, blue-prints, plans, specifications, equipment and parts for the same, that from time to time subsequent to the execution of said contract and up until about the early part of October, 1936, while plaintiffs were engaged in good faith in conducting negotiations with the Mexican [72] government for the purpose of obtaining said concession, said defendants, for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract and for the purpose of inducing said plaintiffs to believe that they were financially able and ready to do the things hereinbefore mentioned, represented to said plaintiffs that said radio stations to be constructed by them as aforesaid would cost when completed not less than the sum of \$90,000, that during said last mentioned period and for the same purposes said defendants from time to time represented to said plaintiffs that they had sufficient assets on hand to enable them to meet said financial requirements and further represented to said plaintiffs that they had expended the sum of \$30,000 on account of \$90,000 worth of equipment for said radio station, and further represented to said plaintiffs that the sum of \$1700, which as hereinafter mentioned they remitted to said plaintiffs, had been obtained by them by the sale of government bonds allegedly owned by them; and

It further appearing that at all times mentioned herein up until the early part of October, 1936, said plaintiffs believed the aforementioned representations and relied upon the same and were induced to and did act thereon and continued to treat said contract as being in full force and effect and to perform their obligations thereunder, until the early part of October, 1936, as hereinafter stated; and

It further appearing that at no time involved herein did said defendants or either or any of them have funds or assets or other means to meet the aforementioned financial requirements or any substantial portion thereof, that at no time involved herein were said defendants or was either or any of them financially able or ready, either wholly or [73] in any substantial degree, to pay the cost of procuring said radio concession or to provide the deposits or equivalent bonds required in connection with said concession, or to pay the cost of constructing, erecting or installing said radio station, that at all times involved herein said defendants were insolvent and judgments totalling several thousand dollars were outstanding and unpaid against each of the defendants Lawrence W. Allen and Willis Allen, that said defendants did not, nor did either or any of them, pay the sum of \$30,000 or any other sum on account of equipment for said radio station, that the aforementioned sum of \$1700 was not obtained by them by the sale of Government or any bonds owned by them, but instead was obtained by them from a party who

borrowed said sum in varying amounts from various members of the public interested in securing legislation establishing old age pensions, that it was the purpose and intention of said defendants to endeavor to raise funds required to obtain and maintain said radio concession and to construct, equip and install said radio station, through the sale of stock in the Mexican corporation proposed to be organized under the terms of said contract, and to which corporation it was contemplated said M. P. Barbachano would transfer said concession after the same had been issued to him by the Mexican government; and,

It further appearing that at all times involved herein, it was the purpose and intention of said defendants to expend not to exceed the sum of \$30,000, if they could procure the same, for the construction, equipment and installation of said radio station and for the fees, deposits and bonds required in connection therewith and the concession [74] pertaining to the same, that said defendants at all times up to the early part of October, 1936, concealed this fact from the plaintiffs, that likewise in the opinion of the engineer whom said defendants consulted with respect to preparing plans and specifications for the construction of such station, said sum of \$30,000 would not have been sufficient to pay the cost of radio antennae, the special structure required for housing the transmitter, the wages of the workmen needed to construct and install the same, and the required deposits and fees, in addition to the cost of con-



structing, equipping and installing said station; and

It further appearing that for the purpose of providing the land upon which said defendants were to construct said radio station, said plaintiffs, at their own expense, on or about June 19, 1936, caused to be removed the building and equipment comprising radio station XEAQ from the premises where the same was then located at Rosarito Beach, Lower California, Mexico, and thereupon notified defendants of that fact; and

It further appearing that on September 19, 1936, the Mexican Government delivered to a representative of plaintiff M. P. Barbachano, at Mexico City, a concession issued in his name for a radio station of the character described in said contract of March 30, 1936, such station to be designated by the letters XERB, that said concession was received by said M. P. Barbachano at Tia Juana, Mexico, on or about September 24, 1936, that on the same day he informed said defendants by telephone of the issuance and receipt of said concession, that on the following day said defendants were permitted to and did inspect said concession and were furnished a typewritten copy and also an English translation thereof, [75] that at the same time said M. P. Barbachano made demand upon said defendants that they furnish 11,000 pesos or a bond in that amount for deposit with the Mexican government on or before October 5, 1936, as required by the terms and conditions of said concession and the law of Mexico, and thereafter



and up until the early part of October, 1936, he repeated said demand; and

It further appearing that under the Mexican law said concession, although bearing date of August 31, 1936, was effective as of the date of its delivery, to wit, September 19, 1936, and under the terms and conditions of said concession and the law of Mexico said concession would have become void in the event of failure to deposit with the Mexican government 11,000 pesos or a bond in that amount within fifteen days after the effective date of said concession; and

It further appearing that at all times involved herein it was known to all of the parties to said contract that said plaintiffs would be obliged to expend approximately the sum of \$27,000 to provide suitable land, buildings and electric power facilities as required by said contract, that said plaintiffs began the construction of such buildings and facilities for said radio station on or about September 25, 1936, and completed the same on or about November 25, 1936; and

It further appearing that on several occasions, particularly during September, 1936, for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract of March 30, 1936, and for the purpose of inducing said plaintiffs to believe that they were financially able and ready to do the things [76] required of them by said contract as hereinbefore mentioned, said defendants represented to said plaintiffs that they had entered into a written con-

tract with Federal Radio and Television Company for the construction, equipment and installation of the radio station required to be built by said defendants under the terms of said contract of March 30, 1936, and further represented that the cost thereof would amount to the sum of \$90,000 and that they had expended the sum of \$30,000 on account toward the purchase of the equipment for such station, and further represented that they were able to complete the construction of said station within the time and in accordance with the conditions required by said contract of March 30, 1936, whereas in truth said defendants did not, nor did either or any of them, enter into any contract of that character or expend such sum or any other amount toward the purchase of the equipment for such station, that on the contrary, and under date of September 28, 1936, said defendants through said Lawrence W. Allen entered into a written contract with one G. W. Berger, then doing business under the name of Federal Radio and Television Company, under the terms of which contract said Berger was employed, for a fee of \$335.00, to prepare and furnish to said defendants schematic drawings together with blue prints thereof showing everything necessary, convenient and customary for the construction of radio station XERB at Rosarito Beach as per said concession, also to prepare and furnish to said defendants complete plans and specifications for the construction, erection, installation and operation of said station, also to furnish complete and detailed estimates of the net costs

of all parts, material, labor and other expenses necessary for the construction, erection, installation and equipment of [77] said station, that likewise under the terms of said contract with Berger it was provided that within a period of not exceeding 60 days after delivery of the aforementioned documents said defendants were entitled to avail themselves of his services for the construction, erection and installation of said radio station at the compensation of \$75.00 per week for a minimum period of ten weeks and a maximum of twelve weeks, plus the additional sum of \$665.00 to be paid ten days after approval by the Mexican government of the complete installation of said station, also that it was recited in said contract with Berger that he was rendering his services at reduced figures for the purpose of establishing his reputation for the construction of high power stations, and that the reasonable market value of the services, labor, equipment and parts that will be represented by said station when complete would be not less than \$90,000, also that it was recited in said contract with Berger that when said station had been completed and all payments mentioned in said contract had been made said Berger would furnish to said defendants if requested a receipted bill of sale for said labor, parts and material of completed equipment, showing payment of the sum of \$90,000, also that it was recited in said contract with Berger that in the construction, erection and installation of said equipment and station, he would obtain all possible discounts in the purchase of parts and

equipment and that he would construct said station in accordance with the highest and most advanced and accepted practice; and

It further appearing that in spite of the recitals and representations in said Berger contract to the contrary it was understood at all times between him and said defendants that not to exceed the sum of \$30,000 would be expended [78] for the drawings, blue-prints, plans and specifications, and for the construction, erection and installation of said radio station, including all equipment and parts for the same; and

It further appearing that it was understood and contemplated by the parties to said contract of March 30, 1936, that the formation and organization of the corporation to be created under the laws of Mexico as mentioned in said contract would not be commenced until said radio concession had been issued to said M. P. Barbachano; and

It further appearing that under Mexican law it would take from fifty to seventy-five days to form and organize such corporation and to obtain from the appropriate officials authorization to transfer said concession to such corporation, that likewise under Mexican law it would be necessary that twenty-five thousand pesos, equivalent to about \$7,000, be provided as paid-up capital of such corporation as a condition precedent to the formation and organization thereof, and that at no time involved herein were said defendants or was either of them or any of them able to furnish the same; and



It further appearing that at no time involved herein did said defendants or either or any of them furnish or tender or show any evidence of ability to furnish 11,000 pesos or a bond in that amount, as required for deposit with the Mexican government under the terms and conditions of said concession, that at no time involved herein were said defendants, or was either or any of them, able to pay for or arrange for the construction or equipment or installation of such radio station; and

It further appearing that upon learning that said concession had been issued to M. P. Barbachano said defendants, [79] prior to October, 1936, and again in the early part of October, 1936, demanded that said concession be turned over to them, that thereupon said plaintiffs refused to cause said concession to be turned over to or transferred to said defendants and demanded that the latter furnish 11,000 pesos or a bond in that amount as required for deposit with the Mexican government under the terms of said concession, and in addition demanded that said defendants furnish a bond in the sum of \$90,000 guaranteeing the completion of the construction, equipment and installation of said radio station, that said demand to furnish said bond at \$90,000 was made by plaintiffs upon and after learning of the falsity of the aforementioned representations made by said defendants and learning that they were insolvent and after they had failed to furnish said eleven thousand pesos or equivalent bond; and

It further appearing that upon and because of the failure of said defendants to furnish said eleven



thousand pesos or equivalent bond said plaintiffs caused a bond in that amount to be deposited with the Mexican government on or about October 5, 1936, and thereby kept said concession in full force and effect; and

It further appearing that at all times involved herein a radio station is deemed under Mexican law to include the lands and the buildings whereon and wherein the same is situated, that likewise under Mexican law no alien or his nominee may use or own or be a stockholder in a Mexican corporation using or owning land in Mexico situate within 100 kilometers from any of its borders or within 50 kilometers from any of its shores, that said Rosarito Beach where [80] said radio station was required to be erected under the terms of said contract of March 30, 1936, was located at all times involved herein less than 100 kilometers south of the Mexican border adjoining the United States and less than 50 kilometers from the Pacific shoreline of Mexico, and that likewise on February 19, 1940, a law enacted by the Congress of Mexico went into effect prohibiting the ownership of a Mexican radio station by an alien or by a corporation having an alien stockholder, and that said law further provided that such ownership would constitute ground for cancelling any radio concession held by an alien or by such corporation; and

It further appearing that on October 5, 1936, said plaintiffs caused to be served on said defendants a notice of rescission of said contract of March 30, 1936, upon the terms and conditions all as more

particularly set forth in that certain instrument admitted in evidence herein and marked defendants' Exhibit A, that at the same time and upon the terms and conditions mentioned in said instrument said plaintiffs offered to return to said defendants the sum of \$1700 theretofore advanced by the latter to the plaintiffs to be paid, and which they did pay, to the Mexican government in connection with said concession, that said defendants rejected said offer, that thereafter said plaintiffs withdrew said offer and elected to apply said sum toward the recoupment of the damages suffered by them as a result of the failure of said defendants to build said radio station and otherwise carry out the terms of said contract of March 30, 1936; and

It further appearing that on September 3, 1937, said defendants caused to be filed in this court a certain civil [81] action designated as No. 8108-H, wherein said Lawrence W. Allen was named as plaintiff and the plaintiffs herein were there named as defendants, that the alleged cause of action pleaded in the complaint filed in said action was one seeking the recovery of \$2041.00 alleged to have been received at sundry times between August 18, 1936, and September 30, 1936, by the within-named plaintiffs from defendant Dexter doing business under the name of Cinema Advertising Agency, that thereafter and on September 10, 1937, the defendants herein caused an amended complaint to be filed in said action, setting forth two counts, the first count being identical with the original

complaint filed therein, and the second count setting forth a purported cause of action wherein it was alleged that at sundry times between January 2, 1936, and October 1, 1936, said Dexter had performed work and rendered services to the within-named plaintiffs at their request for the construction, installation and operation of a radio station and that said services were reasonably worth the sum of \$5,000, that in said action No. 8108-H the within-named defendants on September 3, 1941, caused a writ of attachment to be levied upon various materials, supplies, equipment and apparatus then being manufactured and assembled, and all of which were needed, for the construction, equipment and installation of said radio station to be built at Rosarito Beach, that by reason of such attachment the plaintiffs herein were prevented from completing the construction, equipment and installation of said station within the time required by said concession and the law of Mexico, that because of such delay the Mexican government declared said concession terminated and void, that as a consequence, said M. P. Barbachano, acting on behalf of the plaintiffs, was [82] compelled to and did take steps and expend monies in the additional amount of \$10,000 in order to procure the reinstatement of said concession; and

It further appearing that on or about August 6, 1937, said M. P. Barbachano transferred to the plaintiff Radio Difusora Internacional, a corporation, said concession, also said radio station and appurtenances in the condition then existing at said

Rosarito Beach, in consideration of the issuance of all its capital stock to him, and that ever since said date said Radio Difusora Internacional has been and still is the owner of said concession, radio station and appurtenances; and

It further appearing that by said action No. 8108-H said defendants elected to treat said contract of March 30, 1936, as having been rescinded and to sue to recover the monies advanced by them as aforesaid to said plaintiffs in the amount of \$1700.00 plus the further sum of \$335.00 paid by them to said Berger under the terms of the aforementioned contract made with him under date of September 28, 1936; and

It further appearing that said plaintiffs caused said radio station to be constructed at said Rosarito Beach in conformity with said concession, and that the first time said defendants sought specific performance of said contract of March 30, 1936, or asserted the right to recover damages for the alleged breach of said contract by plaintiffs, or asserted the right to any relief under said contract other than that claimed in the original and in the amended complaints filed in said action No. 8108-H was on or about March 25, 1940, and through the medium of the answer and counterclaim filed by them herein; and [83]

It further appearing that in the construction of said radio station said plaintiffs reasonably expended the sum of \$144,697.88, that said last-mentioned amount included the sum of \$90,000 expended by said M. P. Barbachano out of his own



funds, that whereas he originally had received the entire capital stock of said Radio Difusora Internacional he had been compelled to and did relinquish 80% of said stock in order to obtain the additional sum of \$50,000 required to complete the construction of said radio station; and

It further appearing that on September 10, 1937, a certain action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, entitled John A. Murphy v. International Broadcasting System, et al., wherein the plaintiffs herein and the defendants Dexter and Lawrence W. Allen were also named as defendants, that in said Superior Court action one R. E. Allen was appointed receiver of the property therein described, including property being assembled for use in the construction of said radio station, that thereafter and on or about October 5, 1937, said Lawrence W. Allen, as plaintiff in said action No. 8108-H consented that the property theretofore attached pursuant to the writ of attachment issued therein be surrendered to said R. E. Allen as receiver, that thereafter and on or about October 27, 1937, said receiver caused to be filed in this court a certain civil action designated as No. 8158-Y, wherein the Marshal of this Court, also the plaintiffs herein, as well as others, were named as defendants, that in the complaint filed in said action No. 8158-Y it was alleged, among other matters, that said Marshal had refused to surrender said attached property to said receiver, and also alleged that the defendants in said action



No. 8158-Y excepting a certain surety [84] company, had conspired to convert said attached property and to transport the same to said Rosarito Beach, also alleged that said attached property had a reasonable value of \$30,000, that the reasonable expense incurred and to be incurred in recovering said property and conducting an investigation to recover the same amounted to the sum of \$1,000, also that the reasonable value of the use of said attached property amounted to \$100.00 per day, and praying judgment for the return of said attached property or its value plus \$1,000 expense, plus \$100.00 per day from October 5, 1937, plus \$10,000 exemplary damages, that thereafter and on April 20, 1938, judgment was entered in said action No. 8158-Y decreeing the dismissal thereof for lack of jurisdiction in this court of the subject matter thereof; and

It further appearing that said defendants and each of them have failed to perform the terms and conditions on their part to be performed under said contract of March 30, 1936, or any part thereof, except as hereinbefore recited; and

It further appearing that from time to time from and after October 5, 1936, and until the issuance of an injunction pendente lite herein restrained such acts, said defendants have notified various persons, including officials of the Mexican government, that they were the owners of said concession and of said radio station, also notified such persons that said plaintiffs were not the owners thereof but merely held possession of the same in fraud of the

rights of said defendants, that likewise during said period and until thus restrained said defendants from time to time threatened to sue anyone doing business with said plaintiffs with respect to said radio station, also to attach any amounts which might become owing to said Radio Difusora Internacional from [85] California advertisers using radio time on said station, and that by reason of said statements, threats and acts of said defendants said Radio Difusora Internacional has been and still is unable to commence normal commercial operations of said station; and

It further appearing that said plaintiffs M. P. Barbachano and Border Electric and Telephone Co., Inc., entered into said contract of March 30, 1936, and continued to deal with said defendants under said contract until the early part of October, 1936, in the belief of the truth of the aforementioned representations made by said defendants and in reliance thereon, and that said plaintiffs would not have entered into said contract and would not have continued to deal with said defendants thereunder, but for said representations; and

It further appearing that if said defendants had performed the terms and conditions of said contract, of March 30, 1936, on their part to be performed, they would have commenced the construction of said radio station, within 30 days after the date, to wit, September 19, 1936, on which said concession had been granted, and would have completed the construction of said station, and would have had the same on the air and operating within 120

days thereafter, to wit, on or before January 17, 1937, that thereby and under the terms of said contract said plaintiffs M. P. Barbachano and Border Electric and Telephone Co., Inc., would have become entitled, without cost to themselves, for the broadcast of the activities of said Rosarito Beach for the purpose of advertising said resort and its activities to thirty minutes in the morning, thirty minutes at noon, [86] thirty minutes at 6 p.m. and thirty minutes at midnight every day for a period of five years from March 30, 1936, less the time required to obtain said concession and to complete the construction of said radio station, that said last-named plaintiffs have been deprived of such free broadcasts by the acts and conduct of said defendants, and that the value of such free broadcasts has been at the rate of \$300 per month from and after January 17, 1937; and

It further appearing that if said defendants had performed the terms and conditions of said contract of March 30, 1936, on their part to be performed, and had expended for the construction of said radio station an amount comparable to that expended for the construction thereof, to wit, the sum of \$144,697.88, which sum represents the reasonable cost thereof, then said plaintiffs M. P. Barbachano and Border Electric and Telephone Company, Inc., would have become entitled to purchase 20% of the capital stock of the corporation which under the terms of said radio contract was to acquire said radio station and the concession for the same at an amount equal to 20% of said cost,

to wit, the sum of \$28,939.58, whereas instead of said last named plaintiffs were compelled to and did invest the sum of \$90,000 in the purchase of 20% of the capital stock of the corporation which has acquired said radio station and concession, and thereby said last-named plaintiffs have sustained a loss in the additional sum of \$61,060.42; and

It further appearing that by reason of the aforementioned acts and conduct of said defendants, said last-named plaintiffs have also sustained a loss in the additional sum of \$10,000 expended by the latter, as aforementioned, in order to procure the reinstatement of said concession [87] after the Mexican government had declared the same to have become void and terminated; and

It further appearing that, except as herein otherwise found, each and all of the material allegations of the defendants' answer and amended counterclaim are untrue;

The Court Concludes that plaintiffs are entitled to injunctive relief against said defendants, in conformity with that granted in the injunction pendente lite heretofore issued herein, together with costs;

The Court Further Concludes that said plaintiffs M. P. Barbachano and Border Electric and Telephone Co., Inc., are entitled to damages against said defendants in the respective amounts hereinbefore outlined;

The Court Further Concludes that said defendants are entitled to no relief herein.

[Endorsed]: Filed September 17, 1941.



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for pre-trial hearing on April 10, 1941, and April 30, 1941, and thereafter for trial on June 5, 6, 10, 11, 12, 13, 16 and 17, 1941, before the above-entitled Court, the Honorable Harry A. Hollzer, Judge, presiding, Hardy & Horwin by Leonard Horwin appearing as attorneys for plaintiffs and E. Marion Crawford and Lawrence W. Allen appearing as attorneys for defendants, and oral and documentary evidence having been introduced on behalf of both parties, and plaintiffs having thereafter filed opening and reply briefs and defendants having filed their answering brief, and the court having considered the foregoing and heard the oral arguments of counsel for both parties, and being fully advised, makes the following:

### Findings of Fact

#### I.

The allegations contained in Paragraphs I, [89] II and III of Plaintiffs' Amended Complaint are true.

#### II.

The allegations contained in Paragraph IV of Plaintiffs' Amended Complaint are true, excepting only that the fact is that defendant Cinema Advertising Agency was and is a fictitious firm name



under which defendants Lawrence W. Allen, Willis Allen and M. F. Dexter at all times herein involved did business.

### III.

The allegations contained in Paragraph VI of Plaintiffs' Amended Complaint are true, the facts being that as to the transactions having to do with the making of the contract mentioned in Plaintiffs' Amended Complaint and incorporated therein as Exhibit "A," and what any of the defendants did with reference to said contract at the time it was made and subsequent thereto, each of the defendants was bound by the acts of any of the others.

### IV.

The allegations contained in Paragraph VII of Plaintiffs' Amended Complaint are true, excepting only that the fact is that the contract annexed thereto as Exhibit "A" was between plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., and defendants Lawrence W. Allen, Willis Allen and M. F. Dexter, said contract having been signed on behalf of defendants under the name of Cinema Advertising Agency by said Lawrence W. Allen; that it was provided in the modification of said contract that the concession mentioned in said contract might be obtained in the name of said M. P. Barbachano and thereafter transferred by him to the corporation mentioned in Paragraph 9 of said contract.

### V.

The allegations contained in Paragraph [90]

VIII of Plaintiffs' Amended Complaint are true, excepting only that the fact is that defendants represented to plaintiffs before and after the making of the contract mentioned in Paragraph VII of Plaintiffs' Amended Complaint, and plaintiffs in reliance upon said representations at all times until on or about October 5, 1936, believed that it would cost said defendants not less than \$90,000 to construct said radio station; that at the time of making said representations said defendants believed but did not disclose to plaintiffs that the actual purpose and intention of defendants was to expend not to exceed \$30,000 in the construction of said radio station.

#### VI.

The allegations contained in Paragraph IX of Plaintiffs' Amended Complaint are true, excepting only that the fact is that the Mexican Government delivered said concession to a representative of plaintiff M. P. Barachano at Mexico City on September 19, 1936; that said M. P. Barbachano received said concession at Tia Juana, Mexico, on or about September 24, 1936.

#### VII.

The allegations contained in Paragraph X of Plaintiffs' Amended Complaint are true.

#### VIII.

The allegations contained in Paragraph XI of Plaintiffs' Amended Complaint are true, the facts being that in addition to procuring the concession

for radio station and providing the suitable lands, buildings and electrical power facilities therefor and otherwise performing the terms and conditions of the contract annexed to Plaintiffs' Amended Complaint as Exhibit "A," plaintiffs caused radio station XEAQ at Rosarito Beach, Mexico, to be removed on or about July 19, 1936, in order to enable defendants to use the site thereof for [91] construction of the new radio station, pursuant to said contract.

### IX.

The allegations of Paragraph XII of Plaintiffs' Amended Complaint are true, the facts being that under the laws of the Republic of Mexico said concession for radio station, although bearing date of August 31, 1936, was not effective until the date of its delivery to the concessionaire, to wit, September 19, 1936, and under the terms and conditions of said concession and the laws of said Republic said concession would have become void in the event of failure to deposit eleven thousand pesos or bond in that amount with the Mexican Government within fifteen days after the effective date of said concession, that is, on or before October 5, 1936.

### X.

The allegations of Paragraph XIII of Plaintiffs' Amended Complaint are true, the facts being that on the date said M. P. Barbachano received said concession at Tia Juana, Mexico, to wit, on or about September 24, 1936, he informed defendants by telephone of the issuance and receipt of said

concession; that on the following day, to wit, September 25, 1936, he permitted said defendants to inspect the original concession and furnished them with typewritten copy and English translation thereof; that at the same time said M. P. Barbachano made demand upon said defendants that they furnish eleven thousand pesos or bond in that amount for deposit with the Mexican Government on or before October 5, 1936, as required by the terms and conditions of said concession and the laws of Mexico; that thereafter and up until on or about October 5, 1936, said M. P. Barbachano repeated said demand upon defendants.

# XI.

The allegations of Paragraph XIV of Plaintiffs' Amended Complaint are true, the facts being [92] that at no time involved herein did said defendants, or any of them, furnish or tender or show any evidence of ability to furnish eleven thousand pesos or bond in that amount as required for deposit with the Mexican Government under the terms and conditions of said concession, or furnish or tender, or show any evidence of ability to construct, nor did they construct the radio station as provided in the contract annexed to Plaintiffs' Amended Complaint as Exhibit "A," or furnish or tender or show any evidence of ability to furnish the assets required by the laws of Mexico for minimum paid-up capitalization of the corporation mentioned in Paragraph 9 of said contract; that at no time involved herein were said defendants or any of them able to pay for or arrange for the construc-

tion or equipment or installation of said radio station, or to deposit said eleven thousand pesos or bond in that amount or to furnish said minimum paid-up capitalization of said corporation.

## XII.

The allegations of Paragraphs XV, XVI, XVII and XVIII of Plaintiffs' Amended Complaint are true, excepting only that the bond furnished by plaintiffs as alleged in Paragraph XVII of Plaintiffs' Amended Complaint was in the sum of 11,000 pesos.

## XIII.

The allegations of Paragraph XIX of Plaintiffs' Amended Complaint are true, excepting only that the total cost to plaintiffs of construction of said radio station was \$144,697.88, which sum was at all times and is the reasonable cost of construction of said radio station.

## XIV.

The allegations of Paragraph XX of Plaintiffs' Amended Complaint are true. [93]

## XV.

The allegations of Paragraph XXI of Plaintiffs' Amended Complaint are true, the facts being that from time to time from and after October 5, 1936, and until the issuance of an injunction pendente lite herein restraining such acts, said defendants have notified various persons mentioned in said paragraph, including officials of the Mexican Government and others, that said defendants were the owners of said concession and said radio station and



also notified such persons that said plaintiffs were not the owners thereof but merely held possession of the same in fraud of the rights of said defendants; that likewise during said period and until thus restrained said defendants from time to time threatened to sue anyone doing business with said plaintiffs with respect to said radio station and also to attach any amounts which might become owing to said Radio Difusora Internacional S. A. from California advertisers using radio time on said station; that by reason of said statements, threats and acts of said defendants said Radio Difusora Internacional S. A. has been and still is unable to commence normal commercial operations of said radio station.

That said defendants on or about September 3, 1937, caused to be filed in this court that certain civil action numbered 8108-H wherein said Lawrence W. Allen was named as plaintiff and the plaintiffs herein were named as defendants; that the alleged cause of action pleaded in the complaint filed in said action was one seeking the recovery of \$2,041.00 alleged to have been received at sundry times between August 18, 1936 and September 30, 1936 by the within named plaintiffs from defendant M. F. Dexter doing business under the name of Cinema Advertising Agency; that in said action numbered 8108-H, within named defendants on September 3, 1941, caused a writ of attachment to be levied upon various materials, supplies, equipment and apparatus then being manufactured and assembled and all of which were needed for the construction, equipment and installation of said radio station

to be built at Rosarito Beach, Mexico; that by reason of such attachment the plaintiffs herein were prevented from completing the construction, equipment and installation of said station within the time required by said concession and the laws of Mexico; that because of such delay the Mexican Government declared said concession terminated and void; that as a consequence said M. P. Barbachano acting on behalf of the plaintiffs was compelled to and did take steps and expend monies in the additional amount of \$10,000 in order to procure the reinstatement of said concession; that on September 10, 1937, a certain action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, entitled John A. Murphy vs. International Broadcasting System, et al., wherein the plaintiffs herein and the defendants M. F. Dexter and Lawrence W. Allen were also named as defendants; that in said Superior Court action one R. E. Allen was appointed receiver of the property therein described which included said property being assembled for use in the construction of said radio station; that thereafter and on or about October 5, 1937, said Lawrence W. Allen as plaintiff in said action numbered 8108-H consented that the property theretofore attached pursuant to the writ of attachment issued therein be surrendered to said R. E. Allen as Receiver; that thereafter and on or about October 27, 1937, said Receiver caused to be filed in this court a certain civil action designated 8158-Y, wherein the Marshal of this court, also the plaintiffs herein, as well as others, were named as defendants;

that in the complaint filed in said action 8158-Y, it was alleged, among other matters, that said Marshal had refused to surrender said attached property to said Receiver and also alleged that the defendants in said action 8158-Y, excepting a certain surety company, had conspired to convert said attached property and to transport the same to said Rosarito Beach, Mexico; that said attached property had a reasonable value of \$30,000, that the reasonable expense incurred and to be incurred in recovering said property and conducting an investigation to recover the same amounted to the sum of \$1,000, that the reasonable value of the use of said attached property amounted to \$100 per day, and prayed judgment for the return of said attached property or its value plus \$1,000, plus \$100 a day from October 5, 1937, plus \$10,000 exemplary damages; that thereafter and on April 20, 1938, the court in said action 8158-Y held said action 8108-H and the attachment founded thereon to have been void from the beginning for lack of jurisdictional amount sought in plaintiffs' complaint therein, and accordingly the court on April 20, 1938, entered judgment in said action 8158-Y, decreeing the dismissal thereof for lack of jurisdiction in this court of the subject matter thereof.

#### XVI.

The allegations of Paragraph XXII of Plaintiffs' Amended Complaint are true.

#### XVII.

The allegations of Paragraph XXIII of Plain-

tiffs' Amended Complaint are true, excepting only that the facts are that the damage which plaintiffs incurred as a direct result of the conduct of defendants set forth in Plaintiffs' Amended Complaint and hereinabove in these Findings was and is as follows, to-wit, that said plaintiffs sustained loss in the amount of \$10,000 expended by plaintiff as aforementioned in order to procure the reinstatement of said concession after the Mexican Government had declared the same to have become void and terminated; that, in addition, plaintiffs sustained loss in the sum of \$61,060.42, in that if said defendants had performed the terms and conditions of said contract, incorporated in Plaintiffs' Amended Complaint as Exhibit "A," on their part to be performed and had expended for the construction of said radio station an amount comparable to the amount actually expended for the construction thereof by plaintiffs, to-wit, the sum of \$144,697.88, which sum represents the reasonable cost thereof, the said plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., would have become entitled to purchase twenty per cent of the capital stock of the corporation, which under the terms of said contract was to acquire said radio station and the concession therefor, at an amount equal to twenty per cent of said cost, or \$28,939.58; whereas, instead said last named plaintiffs were compelled to and did invest the sum of \$90,000 in the purchase of twenty per cent of the capital stock of the corporation which has acquired said radio station and concession, or a net loss of \$61,060.42; that, in addition, plaintiffs



have been damaged in the sum of \$15,150, in that if said defendants had performed the terms and conditions of said contract on their part to be performed, they would have commenced the construction of said radio station within thirty days after the date, to wit, September 19, 1936, on which said concession was granted; and would have completed the construction of said radio station and would have had same on the air and operating within 120 days thereafter, to-wit, on or before January 17, 1937; and thereby and under the terms of said contract said plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., would have become entitled without cost to themselves to the broadcast of the activities of said Rosarito Beach, Mexico, for the purpose of advertising the resort thereat owned by said plaintiffs together with its activities, thirty minutes in the morning, thirty minutes at noon, thirty minutes at six p.m., and thirty minutes at midnight, every day for a period of five years from March 30, 1936, less the time required to obtain said concession and to complete construction of said radio station; that said last named plaintiffs have been deprived of such free broadcasts by the acts and conduct of said defendants and that the value of such free broadcasts has been at the rate of \$300 per month from and after January 17, 1937, to and including the end of said five year period, to wit, March 30, 1941, or a total damage of \$15,150.



## XVIII.

The allegations of Paragraphs XXIV, XXV and XXVI of Plaintiffs' Amended Complaint are true.

## XIX.

The allegations of Paragraphs I and III of the second cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action in Plaintiffs' Amended Complaint incorporated in said second cause of action by reference, are true with the qualifications hereinabove in these Findings stated.

## XX.

The allegations of Paragraph II of the second cause of action in Plaintiffs' Amended Complaint are true.

## XXI.

The allegations of Paragraph I of the third cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action of Plaintiffs' Amended Complaint incorporated in said third cause of action by reference, are true with the qualifications hereinabove in these Findings stated.

## XXII.

The allegations of Paragraph II of the third cause of action in Plaintiffs' Amended Complaint are true, the facts being that at all times involved herein, a radio station is deemed under Mexican law to include the lands and the building wherein and whereon the same is situated; that likewise under

Mexican law no alien or his nominee may use or own or be a stockholder in a Mexican corporation using or owning land in Mexico situated within 100 kilometers from any of its borders or within 50 kilometers from any of its shores; that said Rosarito Beach, Mexico, where said radio station was required to be erected under the terms of said contract, incorporated in Plaintiffs' Amended Complaint as Exhibit "A," was located at all times involved herein less than 100 kilometers south of the Mexican Border adjoining the United States, and less than 50 kilometers from the Pacific shore line of Mexico.

### XXIII.

The allegations of Paragraphs III, IV and VI of the third cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action in Plaintiffs' Amended Complaint incorporated in said third cause of action by reference are true with the qualifications hereinabove in these Findings stated.

### XXIV.

The allegations of Paragraph V of Plaintiffs' Amended Complaint are true, excepting only that the total cost to plaintiffs for the construction of said radio station as set forth in said paragraph was and is \$144,697.88, which sum was and is the reasonable cost of construction of said radio station.

### XXV.

The allegations of Paragraph VII of the third cause of action of Plaintiffs' Amended Complaint

are true, the facts being that plaintiffs were damaged as a direct result of defendants' conduct in the amounts set forth in Paragraph XVII of these Findings.

#### XXVI.

The allegations of Paragraph VIII of the third cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said third cause of action by reference are true with the qualifications hereinabove in these Findings stated.

#### XXVII.

The allegations of Paragraph I of the fourth cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said fourth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

#### XXVIII.

The allegations of Paragraph II of the fourth cause of action in Plaintiffs' Amended Complaint are true, excepting only that the fact is that the total cost to plaintiffs for the construction of the radio station mentioned in said paragraph was \$144,697.88, which sum was and is the reasonable cost of said construction.

#### XXIX.

The allegations of Paragraph III of the fourth cause of action in Plaintiffs' Amended Complaint are true.

## XXX.

The allegations of Paragraph IV of the fourth cause of action of Plaintiffs' Amended Complaint are true, the facts being that on February 19, 1940, a law enacted by the Congress of Mexico went into effect prohibiting the ownership of a Mexican Radio Station by an alien or by a corporation having an alien stockholder and said law further provided and provides that such ownership would constitute ground for cancelling any radio station held by an alien or by such corporation.

## XXXI.

The allegations of Paragraph V of the fourth cause of action of Plaintiffs' Amended Complaint are true. [100]

## XXXII.

The allegations of Paragraph VI of the fourth cause of action of Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said fourth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

## XXXIII.

The allegations of Paragraph I of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said fifth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

## XXXIV.

The allegations of Paragraph II of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, the facts being that during the negotiations leading up to the execution of the contract incorporated in Plaintiffs' Amended Complaint by reference as Exhibit "A," also at the time of entering into the same, and from time to time thereafter up until the early part of October, 1936, said defendants repeatedly represented to the said plaintiffs that they were financially able and ready to pay the cost of procuring the radio concession from the Mexican Government mentioned in said contract, also to provide all deposits or equivalent bonds required in connection with such concession, and also to pay the cost of constructing, erecting and installing the radio station described in said contract, including all drawings, blue prints, plans, specifications, equipment and parts for the same; that from time to time subsequent to the execution of said contract and until on or about the early part of October, 1936, while plaintiffs were engaged in good faith in conducting negotiations with the Mexican government for the purpose of obtaining said concession, said defendants for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract and for the purpose of inducing said plaintiffs to believe that said defendants were financially able and ready to do the things hereinabove mentioned, represented to said plaintiffs that said radio station to be constructed by said defendants as



aforesaid would cost when completed not less than the sum of \$90,000; that during said last mentioned period and for the same purposes said defendants from time to time represented to said plaintiffs that they had sufficient assets on hand to enable them to meet said financial requirements and further represented to said plaintiffs that they had expended the sum of \$30,000 on account of \$90,000 total purchase price for the equipment for said radio station, and further represented to said plaintiffs that the sum of \$1700, which defendants caused to be remitted to plaintiffs on or about August 18, 1936, had been obtained by said defendants by the sale of government bonds allegedly owned by them; that on several occasions, particularly during September, 1936, for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract and for the purpose of inducing said plaintiffs to believe that said defendants were financially able and ready to do the things required of them by said contract as hereinabove mentioned, said defendants represented to said plaintiffs that they had entered into a written contract with Federal Radio & Television Company for the construction equipment and installation of the radio station required to be built by said defendants under the terms of said contract of March 30, 1936, and further represented that the cost thereof would amount to the sum of \$90,000, and that said defendants expended an amount of \$30,000 on account of the purchase of the equipment for said station, and further represented that they were able to complete the

construction of said station within the time and in accordance with the conditions required by said contract.

### XXXV.

The allegations of Paragraph III of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, the facts being that at all times mentioned herein, up until the early part of October, 1936, said plaintiffs believed the representations set for in Paragraph XXXIV of these Findings and relied upon the same and in the absence of said representations would not have entered into the said contract of March 30, 1936, and were induced to and did act thereon and continued to treat said contract as being in full force and effect and to perform their obligations thereunder in reliance upon said representations until the early part of October, 1936.

### XXXVI.

The allegations of Paragraph IV of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, the facts being that at no time involved herein did said defendants or any of them have funds or assets or other means to meet the financial requirements of said contract or any substantial portion thereof; that at no time involved herein were said defendants or any of them financially able or ready, either wholly or in part, in any substantial degree to pay the cost of procuring said radio concession or to provide the deposits or equivalent bonds required in connection with said con-

cession, or to pay the cost of constructing, erecting and installing said radio station; that at all times involved herein said defendants were insolvent and judgments totaling several thousand dollars were outstanding and unpaid against each of the defendants Lawrence W. Allen and Willis Allen; that said defendants did not nor did any of them pay the sum of \$30,000 or any other sum on account of equipment for said radio station; that the sum of \$1700 mentioned in Paragraph XXXIV of these Findings was not obtained by said defendants [103] by the sale of government bonds, or any bonds or property owned by said defendants, but instead was obtained by them from a party who borrowed said sum in varying amounts from various members of the public interested in securing legislation establishing old age pensions; that it was the purpose and intention of said defendants to endeavor to raise funds required to obtain and maintain said radio station and to construct, equip and install said radio station through the sale of stock in the Mexican corporation proposed to be organized under the terms of said contract and to which corporation it was contemplated that plaintiff M. P. Barbachano would transfer said concession after the same had been issued to him by the Mexican Government; that it was the purpose and intention of said defendants to expend not to exceed the sum of \$30,000 in all, if they could procure the same, for the construction, equipment and installation of said radio station, and for the fees, deposits and bonds required in connection therein, therewith and for the conces-

sion pertaining to the same; and said defendants at all times up to the early part of October, 1936, concealed the above-mentioned facts from the plaintiffs; that likewise in the opinion of the Engineer whom said defendants consulted with respect to the preparation, plans and specifications for the construction of said radio station, said sum of \$30,000 would not have been sufficient to pay the cost of radio and antenna, the separate structure required for housing the transmitter, the wages of the workmen needed to construct and install the same, and the required deposits and fees, in addition to the cost of constructing, equipping and installing said station.

That said defendants did not nor did any of them enter into a contract with said Federal Radio and Television Company of the character as set forth in Paragraph XXXIV of these Findings or expend the sum of \$30,000 or any other amount towards the purchase of the equipment for such station; that on the contrary, under date of September 28, 1936, said defendants through said Lawrence W. Allen entered into a written contract with one G. W. Berger, then doing business under the name of Federal Radio and Television Company, under the terms of which contract, said Berger, in consideration of \$335 to be paid him by said defendants, was to prepare and furnish the said defendants schematic drawings, together with blue prints thereof, showing everything necessary, convenient and customary for the construction of said radio station at Rosarito Beach, Mexico, as per said concession, also to prepare and furnish to said defendants complete plans and speci-



fications for the construction, erection, installation and operation of said station, also to furnish completed and detailed estimates of the net cost of all parts, material, labor and other expenses necessary for the construction, erection, installation and equipment of said station; that likewise under the terms of said contract with Berger, it was provided that within a period of not exceeding sixty days after delivery of the aforementioned documents, said defendants were entitled to avail themselves of his services for the construction, erection and installation of said radio station at the compensation of \$75.00 per week for a minimum period of ten weeks and a maximum period of twelve weeks, \$665 to be paid ten days after approval by the Mexican Government of the complete installation of said station; that it was recited in said contract with Berger that he was rendering his services at reduced figures for the purpose of establishing his reputation for the construction of high-powered radio stations, and that the reasonable market value of the services, labor, equipment and parts to be represented by said station when complete would be not less than \$90,000; that it was recited in said contract with Berger that when said station had been completed and all payments mentioned in said contract had been made said Berger would furnish to said defendants if requested a receipted bill of sale for said labor, parts and material or completed equipment, showing payment of the sum of \$90,000; that it was recited in said contract with Berger that in the construction, erection and installation of said equipment and sta-



tion he would obtain all possible discounts in the purchase of parts and equipment and that he would construct said station in accordance with the highest and most advanced and accomplished practice; that in spite of the recitals and representations in said contract to the contrary, it was understood at all times between him and said defendants that said defendants would expend not to exceed the sum of \$30,000 for the drawings, blue prints, plans and specifications and for the construction, erection and installation of said radio station, including all equipment and parts for the same and for the cash or other deposits required in connection with procurement and maintenance of radio concession therefor.

That it was understood and contemplated by the parties to said contract incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," that the formation and organization of the corporation to be created under the laws of Mexico as mentioned in said contract would not be commenced until said radio concession had been issued to said M. P. Barbachano; that the fact was that under Mexican law it would take from fifty to seventy-five days to form and organize such corporation and to obtain from the appropriate Mexican officials authorization to transfer said concession to such corporation; that likewise under Mexican law it would be necessary that 25,000 pesos, equivalent to about \$7,000, be provided as paid up capital of such corporation as a condition precedent to the formation and capitalization thereof; that at no times involved herein were said defendants or any of them able to furnish said \$7,000.

XXXVII.

The allegations of Paragraphs V of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, excepting only that the allegations of the [106] first cause of action incorporated in said fifth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

XXXVIII.

None of the allegations of Paragraphs I and II of Defendants' Amended Answer are true.

XXXIX.

None of the allegations of Paragraph III of Defendants' Amended Answer are true, excepting only that so much of the allegations thereof are true as admit the allegations of Paragraphs VII, VIII and XXI of Plaintiffs' Amended Complaint.

XL.

None of the allegations of Paragraph IV of Defendants' Amended Answer are true, excepting only so much thereof as incorporates by reference portions of Defendants' Amended Answer hereinabove in these Findings found to be true.

XLI.

None of the allegations of Paragraph V of Defendants' Amended Answer are true, excepting only so much thereof as incorporates by reference portions of paragraphs of the Amended Answer hereinabove in these Findings found to be true, and so

much thereof as admits the allegations of Paragraph IX of Plaintiffs' Amended Complaint.

#### XLII.

None of the allegations of Paragraph VI of Defendants' Amended Answer are true, excepting only so much thereof as incorporates by reference portions of paragraphs of Defendants' Amended Answer hereinabove in these Findings found to be true.

#### XLIII.

None of the allegations of Paragraph VII, VIII, IX and X of Defendants' Amended Answer are true, excepting only that it is true that on or about October 5, 1936, plaintiffs caused to be served on defendants the written notice of rescission in evidence as defendants' Exhibit "A"; that it is likewise true that plaintiffs constructed the radio station at Rosarito Beach themselves at their own expense.

#### XLIV.

None of the allegations of Paragraph I of Defendants' Amended Counter-Claim are true, excepting only that it is true that The Border Electric and Telephone Co., Inc., and Radio Difusora Internacional, S. A., at all times involved herein were and are Mexican corporations; that defendants at all times involved herein were and are citizens and residents of the State of California in this judicial district and division; that a certificate of fictitious firm name for defendant Cinema Advertising Agency has been filed with the County Clerk for the County of Los Angeles, State of California.

## XLV.

None of the allegations of Paragraph II of Defendants' Amended Counter-Claim are true, excepting that it is true that the contract dated March 30, 1936, incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," was entered into between plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., and defendants Cinema Advertising Agency, Lawrence W. Allen, Willis Allen and M. F. Dexter, and it is true that said contract included the provisions mentioned in said paragraph.

## XLVI.

None of the allegations of Paragraph III of Defendants' Amended Counter-Claim are true, excepting only that it is true that the concession mentioned therein contained the provisions set forth in said paragraph, not including, however, the date of issuance set forth in said paragraph, said date of issuance having been as found in Paragraph IX of these Findings; that on or about August 18, 1936, defendants caused to be sent to plaintiffs \$1700 covering costs and fees incident to procurement of said concession, the fact being, however, that said sum of \$1700 was not obtained by said defendants out of their funds as represented by them but instead was obtained by them from a party who borrowed said sum in various amounts from various members of the public interested in securing legislation establishing old age pensions; that after issuance of said concession defendants demanded that plaintiffs turn over the concession, the facts being,



however, that prior to October, 1936, and again in the early part of October, 1936, defendants demanded that plaintiffs turn the concession over to defendants, that plaintiffs refused to turn over the concession as demanded by the defendants; that plaintiffs demanded that defendants furnish a bond in the sum of \$90,000 guaranteeing completion of the construction, equipment and installation of said radio station; that at the time of making said demand plaintiffs had discovered and the fact was that defendants had not contracted for the construction of the radio station as represented to plaintiffs by defendants; that defendants were insolvent and unable to complete said construction and that neither then nor at any other time had defendants or any of them paid any part of the purchase price of said radio station to anyone, and plaintiffs made said demand upon defendants to furnish said \$90,000 after defendants had failed to furnish said eleven thousand pesos or equalivent bond as required by said concession and laws of Mexico applicable thereto.

#### XLVII.

None of the allegations of Paragraphs IV, V, VI, VII, VIII, IX, X and XI of Defendants' Amended Counter-Claim are true, excepting only that it is true as alleged in Paragraph IV thereof that said concession required deposit of a bond in the sum of 11,000 pesos with the Mexican Government within fifteen days from date of issuance thereof. [109]

#### XLVIII.

The allegations of Paragraph I of Plaintiffs'



Reply to Defendants' Amended Counter-Claim are true.

#### XLIX.

The allegations of Paragraph II of Plaintiffs' Reply to Defendants' Amended Counter Claim are true, excepting only that the parties to said contract of March 30, 1936, incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," were as set forth in Paragraph IV of these Findings.

#### L.

The allegations of Paragraphs III, IV, V, VI and VII of Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, excepting only that the bond required by said concession to be deposited with the Mexican Government, as mentioned in Paragraph IV of said Reply, was in the sum of 11,000 pesos.

#### LI.

The allegations of Paragraph I of the second affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, the facts being that on or about September 3, 1937, defendants caused to be filed in this court a certain civil action designated as 8108-H, wherein said Lawrence W. Allen was named as plaintiff and the plaintiffs herein were named as defendants; that the alleged cause of action pleaded in the complaint filed in said action was one seeking the recovery of \$2,041 alleged to have been received at sundry times between August 18, 1936, and September 30, 1936, by the within named plaintiffs from defendant M. F.

Dexter, doing business under the name of Cinema Advertising Agency; that by said action and by express written election contained in pleadings of said Lawrence W. Allen in said action the defendants herein elected to treat said contract of March 30, 1936, incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," as having been rescinded and to recover the monies allegedly advanced by them as aforesaid to said plaintiffs in the amount of \$1700, plus the further sum of \$3350 paid by them to said Berger under the terms of their contract with said Berger, dated September 28, 1936, hereinabove in Paragraph XXXVI of these Findings described.

### LII.

The allegations of Paragraph II of the second affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, excepting only that the cost of construction of said radio station to plaintiffs was \$144,697.88, which sum was and is the reasonable cost of construction of said radio station.

### LIII.

The allegations of Paragraph III of the second affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true.

### LIV.

The allegations of Paragraph I, II, III and IV of the third affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true.

LV.

The allegations of Paragraphs I, II, III and IV of the fourth affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true.

LVI.

The allegations of Paragraph I of the fifth affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, the facts being as stated in Paragraph XXX of these Findings.

LVII.

The allegations of Paragraph I of the sixth affirmative defense in Plaintiffs' reply to Defendants' Amended Counter-Claim are true, excepting only that the allegations of Plaintiffs' first cause of action incorporated by reference in said sixth affirmative defense are true with the qualifications hereinabove in these Findings stated.

LVIII.

The allegations of Paragraph II of the sixth affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, the facts being that, in addition to the facts set forth under Paragraph LVII of these Findings, said Plaintiffs caused said radio station to be constructed at said Rosarito Beach in conformity with said contract of March 30, 1936; that the first time said defendants sought specific performance of said contract or asserted the right to recover damages for the alleged breach of said contract by said plaintiffs or asserted

the right to any relief under said contract other than that claimed in said action 8108-H, was on or about March 25, 1940, and through the medium of the Answer and Counter-Claim filed by them herein; that in the construction of said radio station said plaintiffs reasonably expended the sum of \$144,-697.88.

#### XLIX.

The allegations of Paragraphs I and V of the seventh affirmative defense added by Plaintiffs' Amendment to their Reply to Defendants' Amended Counter-Claim are true, excepting only that the allegations of Plaintiffs' first cause of action incorporated in said seventh affirmative defense by reference are true with the qualifications hereinabove in these Findings stated.

#### LX.

The allegations of Paragraphs II, III and IV of the seventh affirmative defense added by Plaintiffs' Amendment to their Reply to Defendants' Amended Counter-Claim are true. [112]

#### LXI.

Excepting as otherwise hereinabove specifically set forth all of the allegations of Plaintiffs' Amended Complaint and Reply to Defendants' Amended Counter-Claim are true, and none of the allegations or denials of Defendants' Amended Answer or Amended Counter-Claim are true.

#### Conclusions of Law

From the foregoing facts the Court makes the following Conclusions of Law.

I.

Plaintiffs are entitled to judgment against defendants in the amount of \$86,210.42.

II.

Plaintiffs are entitled to injunctive relief against the defendants and each of them in conformity with that granted in the injunction pendente lite heretofore issued herein, together with their costs.

III.

Plaintiffs are entitled to judgment decreeing that none of the defendants are entitled to any relief against any of the plaintiffs and that none of the defendants are entitled to any interest in any of the plaintiffs.

IV.

Plaintiffs are entitled to judgment releasing plaintiffs' surety from liability under the surety bond posted by plaintiffs herein as security in accordance with the injunction pendente lite herein.

Dated: October 17, 1941.

/s/ H. A. HOLLZER,  
Judge.

[Endorsed]: Filed October 18, 1941.



In the United States District Court, Southern  
District of California, Central Division  
No. 827-H

M. P. BARBACHANO, et al.,

Plaintiffs,

vs.

LAWRENCE W. ALLEN, et al.,

Defendants.

### JUDGMENT

The above-entitled cause came on regularly for trial on June 5, 6, 10, 11, 12, 13, 16 and 17, 1941, in the above-entitled Court before the Honorable Harry A. Hollzer, Judge Presiding, Hardy & Horwin by Leonard Horwin appearing at attorneys for plaintiffs and E. Marion Crawford and Lawrence W. Allen appearing at attorneys for defendants, and evidence both oral and documentary having been introduced and the parties having filed their Briefs and made oral argument following trial, and the cause having been submitted for decision and the Court having heretofore made and caused to be filed its written Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that:

1. Plaintiffs recover from defendants Cinema Advertising Agency, Lawrence W. Allen, Willis Allen and M. F. Dexter the sum of \$86,210.42, together with costs amounting to \$343.99; [114]

2. That each of the defendants herein, their principals, servants and employees or other persons associated with them be and they are hereby permanently enjoined from making, publishing, communicating or causing to be made, published or communicated to any person or persons statements to the effect that defendants or any of them or any person or persons acting on their behalf are the owners of the concession for radio station XERB at Rosarito Beach, Mexico, or radio station XERB or of the buildings, equipment or other appurtenances of said radio station, or to the effect that plaintiffs have no interest or right therein, or that plaintiffs merely have the possession of said radio station and concession in fraud of the rights of defendants or that defendants will file suit, attach or take other legal steps against persons doing business with any of the plaintiffs with respect to said radio concession or radio station; from interfering in any way directly or indirectly with the operation of said radio station by plaintiff Radio Difusora Internacional, S. A., or interfering with persons doing business or seeking to do business with said company or owning or seeking to purchase stock in said company;

3. That the injunction pendente lite herein be and the same is hereby dissolved and the parties and their surety released and discharged from all liability upon the surety bond on file herein supporting said injunction pendente lite;

4. That the defendants are not entitled to and none of the defendants have any interest in any of the plaintiffs;

5. That defendants take nothing by their Amended Answer or Amended Counter-Claim herein.

Dated: October 17, 1941.

/s/ H. A. HOLLZER,  
Judge.

Judgment entered Oct. 18, 1941.

Docketed Oct. 18, 1941.

[Endorsed]: Filed October 18, 1941. [116]

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR ENFORCEMENT  
OF JUDGMENT AFTER LAPSE OF FIVE  
YEARS FROM DATE OF ENTRY

(California Code of Civil Procedure, Section 685.)

To Willis Allen, Lawrence W. Allen, M. M. Dexter,  
also known as M. F. Dexter, and Cinema Ad-  
vertising Agency, defendants.

Please Take Notice, that the undersigned will bring the attached motion on for hearing before this Court at Room 8, Federal Building, Los Angeles, California, on Monday, May 22, 1950, at 10 o'clock

in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ LEONARD HORWIN,  
Attorney for Plaintiffs.

[Endorsed]: Filed May 5, 1950. [117]

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[Title of District Court and Cause.]

MOTION FOR ENFORCEMENT OF JUDG-  
MENT AFTER LAPSE OF FIVE YEARS  
FROM DATE OF ENTRY

Plaintiffs move the court as follows:

That the court issue its order directing that writ of execution upon the judgment for plaintiffs herein in the sum of \$86,210.42 together with plaintiffs' costs in the sum of \$343.99 and interest at the statutory rate to date, issue against defendants, notwithstanding the lapse of more than five years since the entry of said judgment.

This motion is made upon notice to the judgment debtors, and is based upon plaintiffs' Memorandum of Points and Authorities, and the Affidavits of Leonard Horwin, William M. Rabow and Cleveland B. Swift, attached hereto.

/s/ LEONARD HORWIN,  
Attorney for Plaintiffs.

[Endorsed]: Filed May 5, 1950. [118]

[Title of District Court and Cause.]

## AFFIDAVIT OF LEONARD HORWIN

State of California,  
County of Los Angeles—ss.

Leonard Horwin, being first duly sworn, states:

At all times herein mentioned I was and am an attorney at law duly licensed as such under the laws and statutes of the State of California, and attorney for the plaintiffs herein.

On or about October 18, 1941, the Court, by the Honorable Harry Hollzer, Judge, deceased, entered judgment herein against the defendants, including judgment for damages for their fraud in the sum of \$86,210.42, together with plaintiffs' costs in the sum of \$343.99; that execution of said judgment was stayed until October 27, 1941;

That on February 11, 1942, Affiant caused said judgment to be recorded with the County Recorder of the County of Los Angeles at page 231 of Book 19078 of the Official Records, as a lien on any property defendants or any of them might possess or acquire;

That notwithstanding that defendants testified at the trial in this action that they and each of them were substantially without assets, and that the Court in its findings so found, Affiant from on or about October, 1941, to on or about August, 1942, sought to locate assets, if any, belonging to defendants, and available to satisfy the judgment herein. In that connection, [119] Affiant investigated the business,



political and other connections of each of the defendants, and confirmed that the defendants were promoters and managers of a statewide organization for so-called old age pensions popularly known as the "Ham and Eggs" organization, which said organization had collected substantial sums of money from great numbers of aged residents of the State of California; that nevertheless no assets were registered in the names of said defendants or any of them in the various registries of public records of the State of California and County of Los Angeles, other than the registration of the fictitious firm name of Cinema Advertising Agency, which said Agency had substantially no assets; that various other judgments and claims were already outstanding and unsatisfied for considerable periods of time against said defendants; that said defendants and each of them had a credit reputation for being "judgment proof"; that with the exception of their connection with said "Ham and Eggs" organization, said defendants had no visible sources of assets; that said "Ham and Eggs" organization denied payment of benefits to said defendants, or that defendants owned or benefitted from the assets of said organization; that defendants confirmed such denial, and further denied that they had any assets with which to satisfy the judgment herein; that there were no visible means by which to collect from said defendants; that the issuance of a writ of execution against them or the conduct of proceedings supplemental thereto, would be idle acts;

That, notwithstanding the following, Affiant, in

an effort to exercise all possible diligence on behalf of his clients, and with their consent, caused the judgment herein, on or about August, 1942, to be assigned for collection to United States Credit Bureau, a collection agency; [120]

That the efforts of said United States Credit Bureau to collect are as set out in the Affidavit of Cleveland B. Swift attached hereto; that periodically said Bureau kept the Affiant informed of said efforts and Affiant urged said Bureau to further efforts until April 2, 1949, when said Bureau returned the judgment herein to Affiant as uncollectible and said assignment was terminated;

That in a continued effort to exercise all possible diligence on behalf of his clients, Affiant, on or about June, 1949, caused the judgment herein to be assigned for collection to Pacific Coast Collection Service, 625 West Olympic Boulevard, Los Angeles, California, a collection agency.

That the efforts of said Service to collect are as set out in the Affidavit of William M. Rabow attached hereto; that periodically said Service kept Affiant informed of said efforts, and Affiant urged said Service to further efforts until February 2, 1950, when said Service returned said judgment to Affiant as uncollectible, and said assignment was terminated.

That plaintiffs through Affiant, their attorney, have exercised utmost diligence in endeavoring to collect said judgment from defendants but without locating assets out of which to satisfy said judgment; that on the basis of the results of said efforts,

plaintiffs did not cause a writ of execution to be issued herein or undertake proceedings supplemental thereto, for the reason that such writ and proceedings would have been idle acts and merely useless additions to the losses already incurred by plaintiffs by reason of the fraud of defendants as adjudicated herein;

That notwithstanding the bankruptcy of Willis Allen in 1943 and in accordance with the law applicable thereto, said Willis Allen continues liable along with the other defendants for the judgment herein, which is for fraud; [121]

That Affiant is informed and believes, and on the basis thereof avers that, notwithstanding failure of collection efforts to date, the defendants are now in a position to satisfy said judgment or a part thereof;

That no part of said judgment has been paid, and the whole of said judgment is due and unsatisfied;

That in accordance with Rule 69 of this Court and Section 685 of the Code of Civil Procedure of the State of California, Affiant prays this Court to order that a writ of execution based upon said judgment issue against the defendants herein.

/s/ LEONARD HORWIN.

Subscribed and sworn to before me this 10th day of April, 1950.

[Seal] /s/ EDNA B. BENNETT,

Notary Public in and for this  
Said County and State.

[Endorsed]: Filed May 5, 1950. [122]

[Title of District Court and Cause.]

AFFIDAVIT OF CLEVELAND B. SWIFT

State of California,

County of Los Angeles—ss.

Cleveland B. Swift, being duly sworn states:

At the times mentioned herein I was and now am Department Manager of the United States Credit Bureau, 125 South Fremont Avenue, Los Angeles, California, in charge of collections of judgments and claims. I have specialized in such collections for some fifteen years and am thoroughly experienced therein.

On behalf of United States Credit Bureau Collection Agency established in Los Angeles and continuously active for some thirty years, I endeavored to collect the judgment in favor of plaintiffs in the within action in the manner hereinafter related.

In August, 1942, plaintiffs, by their attorney, Leonard Horwin, assigned said judgment to United States Credit Bureau for collection and efforts to collect were commenced immediately thereafter and pursued diligently until April 2, 1949, at which time the judgment was returned to plaintiff as uncollectible.

On or about August, 1942, and thereafter periodically until April 2, 1949, letters of demand for payment of said judgment were sent to each of the defendants without result. [123] On or about August, 1942, and periodically thereafter until April 2, 1949, the various public records of property transfers and ownership interests including indices of the Department of Motor Vehicles, records of the

County Recorder of Los Angeles County and of the County Assessor of Taxes, City Directory, Telephone Directory, and so forth, were checked to ascertain possible assets of the defendants but without result.

On or about August, 1942, and periodically thereafter during said period, defendants, Willis Allen and Lawrence Allen were contacted personally by telephone and otherwise but denied that they or any of the defendants herein had assets with which to satisfy the said judgment.

On or about August, 1942, and periodically thereafter during said period investigations of possible bank accounts and safety deposit boxes of the defendants were made in the various banks in the vicinity of their then address, to wit, 1731 North Highland Avenue, Hollywood, California, without result.

On or about July 27, 1943, affiant ascertained that the defendant, Willis Allen, had filed in bankruptcy in this Court under No. 42543-OC, and thereafter on or about October, 1943, was discharged as bankrupt with a finding of no assets.

From time to time during said period, reports appeared in the public press of the City of Los Angeles concerning political activities of the defendants, Lawrence W. Allen, and Willis Allen, and the political connections of said defendants, and on each of such occasions affiant endeavored to ascertain whether said activities and connections were productive of assets by which said judgment could be satisfied but without locating any assets.



Accordingly, notwithstanding most diligent efforts of affiant and United States Credit Bureau, no part of the within judgment is satisfied by defendants and no assets available to [124] satisfy said judgment could be located. Wherefore United States Credit Bureau returned the judgment to plaintiffs under date of April 2, 1949, as uncollectible and said assignment was accordingly terminated.

/s/ CLEVELAND B. SWIFT.

Subscribed and sworn to before me this 7th day of March, 1950.

[Seal]      /s/ ROGER K. LATHY,

Notary Public in and for  
Said County and State.

My Commission Expires April 9, 1952.

[Endorsed]: Filed May 5, 1950. [125]

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[Title of District Court and Cause.]

### AFFIDAVIT OF WILLIAM M. RABOW

William M. Rabow, being duly sworn states: At all times mentioned below I was and am a collector employed by Pacific Coast Collection Service, 625 West Olympic Boulevard, Los Angeles, California, in the collection of judgments and claims.

As such collector, and on behalf of Pacific Coast Collection Service, I endeavored in the manner hereinafter related, to collect the judgment for plaintiffs in the within case;

In June, 1949, the plaintiffs herein by means of their attorney, Leonard Horwin, assigned the judgment in their favor to Pacific Coast Collection Service for collection. Immediately following said assignment:

I ascertained on or about June 23, 1949, that the present business address of the defendants, Lawrence W. Allen, Willis Allen, M. F. Dexter, also known as M. M. Dexter, and Cinema Advertising Agency, is the law office of said Lawrence W. Allen, at 1204 South Hill Street, Los Angeles, California.

On or about the same date letters of demand for payment were written to each of the defendants at the said address and the defendant, Willis Allen, was contacted by me personally at which time said Willis Allen stated that neither he nor any of the other defendants had assets with which to [126] satisfy the judgment herein and that he, Willis Allen, had been adjudicated bankrupt in 1943 in the Federal District Court for this District and Division under No. 42543-O C.

On or about the same date I searched the records of the State of California and County of Los Angeles including indices of the Department of Motor Vehicles, Tax Assessor of Los Angeles County, County Recorder and other public records of ownership and ownership interests, and ascertained that no interests in the name of said defendants appeared except that said Cinema Advertising Agency was registered in the fictitious name files of Los Angeles County as a firm organized on September 3, 1947,

by the Defendant, Dexter, with then home address given as 6775 Hawthorne Avenue, Los Angeles.

I also checked the records of said bankruptcy action and ascertained that said Willis Allen was in fact adjudicated bankrupt in October, 1943.

Thereafter until February 2, 1950, said public records were periodically rechecked by affiant for the purpose of ascertaining assets of the defendants, without result, except as hereinafter mentioned. On or about October, 1949, affiant discovered that Willis Allen, 634 North Cherokee Avenue, Los Angeles, was the registered owner of a 1947 Cadillac Sedan, but the legal owners were given as Neil W. Allen and Shirley Jean Allen. Thereupon affiant endeavored to contact Neil W. Allen and Shirley Jean Allen and succeeded in October in speaking to the latter who refused to disclose the amount of indebtedness of the said vehicle. It also appeared that said Neil W. Allen and Shirley Jean Allen were blood relations of the defendant, Willis Allen, and that there was little or no possibility of establishing a net ownership interest of said defendant in said motor vehicle.

Periodically from June, 1949, to February 2, 1950, [127] affiant sent further letters of demand for payment of the judgment herein to the several defendants but without result.

Telephone calls to the defendant, Lawrence W. Allen, were likewise made repeatedly during said period but without result except that on or about October, 1949, the defendant, Lawrence W. Allen, stated to affiant that the defendant, M. F. Dexter,

also known as M. M. Dexter, had left Cinema Advertising Agency and gone east to an unknown address which said defendant refused to disclose.

Commencing in June, 1949, and periodically thereafter, affiant checked the various banks in the vicinity of Twelfth and Hill Street, Los Angeles, that is to say the vicinity of said office of the defendants, but without locating any accounts or safe deposit boxes in the name of any of the defendants.

Notwithstanding the efforts of affiant as aforesaid, no part of the judgment herein was satisfied by the defendants or any of them and affiant was unsuccessful, notwithstanding his most diligent efforts, in locating any of the assets of defendants out of which said judgment could be satisfied. Accordingly, the judgment herein was returned on February 2, 1950, to the plaintiffs herein by their attorney, Leonard Horwin, as uncollectible by Pacific Coast Collection Service and the assignment to said Service was terminated.

/s/ WILLIAM M. RABOW.

Subscribed and sworn to before me this 4th day of March, 1950.

[Seal]        /s/ BERTRAM COHN,

Notary Public in and for the County of Los Angeles,  
State of California. [128]

[Title of District Court and Cause.]

## MEMORANDUM OF POINTS AND AUTHORITIES

1. "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held . . . "

Rule 69(a) Rules of Civil Procedure for the District Courts of the United States.

In re Rebman, 150 F. 759 (CCA 9th, 1906)

2. "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code . . . "

Section 685 California Code of Civil Procedure.

3. All that is required of the judgment creditor under CCP 685 is a showing of reasonable diligence in efforts to collect. A showing of compliance with average law office procedure in such matters, suffices.

Failure to cause writ of execution to issue, or proceedings supplementary to execution to be instituted earlier is not a defense, where it appeared from the public records or otherwise that such steps would have been idle acts. [129]



(a) “Respondent’s affidavit, although lacking in detail, appears to us to be sufficient. It indicates about the usual procedure that would be taken in the average law office to collect a judgment where the records revealed no assets belonging to the judgment debtor. Extreme diligence is not demanded nor is there anything in the law which requires the judgment creditor to institute proceedings supplemental to execution to compel the judgment debtor to appear in court to answer concerning his property.”

Terrill v. Shepherd, 57 CA (2d) 290 at 294-5 (3d dist 1943), granting execution after lapse of nine years from entry of judgment.

(b) “The law does not require idle acts and the statute under consideration should not be given a construction which would penalize a creditor for inactivity when he in good faith explores the available sources of information. There is no rule of law which requires a creditor to continue a vigorous search for something he believes does not exist and which does not in fact exist.”

(c) Helvey v. Castles, 73 CA (2d) 667, at 673 (2nd dist, 1946), granting execution ten years after entry of judgment.

“In the present case, as was said in Terrill v. Shepherd, 57 CA (2d) 290, 294, appellant’s affidavit seeking the relief afforded by section 685, ‘indicates about the usual procedure that would be taken in the average law office to collect a judgment where

the records revealed no assets belonging to the judgment debtor. Extreme diligence is not required.' ”

(d) *Twendle v. Clinch*, 74 CA (2d) 480 at 484 (2nd dist, 1948), granting execution thirteen years after entry of judgment.

Accord. *Greeley v. Benevolent Assn.* 28 CA (2d) 536 (1st dist 1938), granting execution nineteen years after entry of judgment. [130]

4. The mere lapse of time is not in itself a defense.

(a) “Diligence is required, but not extreme diligence, in attempting to enforce a judgment. The mere lapse of time is not in itself a sufficient ground for the denial of defendant’s motion (citing cases). The failure of a judgment creditor to take action to collect a judgment within five years after its entry is not ground for refusing to grant a motion for the issuance of an execution (citing cases), and the fact that at some time during the five-year period subsequent to the date of entry of judgment appellant may have had property that could have been levied on pursuant to section 681 is not a sufficient reason for a denial of relief under section 685 (citing cases). Orders have been sustained for the issuance of executions after twenty years (*Weldon v. Rogers*, 159 Cal. 700); after nineteen years (*Peers v. Stoll*, 32 CA (2d) 511; ) after sixteen years (*Trendle v. Clinch*, 74 CA (2d) 480); *McClelland v. Shaw*, 23 CA (2d) 107; after fourteen years (*Bredfield v. Hannon*, 151 Cal. 497; ) *Doehla v. Phillips*, 151 Cal. 488; *Helvey v. Castles*, 73 CA (2d)

667; after thirteen years (Welk v. Connor, 102 CA 286; ) after 12 years (Mohr v. Ricconi, 14 CA (2d) 416); (Corcoran v. Duffy, 18 CA (2d) 658); Crowley v. Super Ct., 17 CA (2d) 52.”

Long v. Long,

76 CA (2d) 716 at 721-2 (2nd dist 1946),  
granting execution fourteen years after entry  
of judgment.

(b) Faias v. Superior Court,  
133 CA 525 (1st dist 1933)

5. Upon a showing of reasonable diligence, it is incumbent upon the judgment debtor, not only to disprove it, but also to show that he was harmed by the lapse of time in issuance of the writ of execution, and denial of the judgment creditor’s motion in the absence of such a showing by the judgment debtor is reversible error.

(a) “The doctrine of laches can be invoked only where by reason of Plaintiff’s acts, the allowance of the claim would work [131] an unwarranted injustice. (Hovey v. Bradbury, 112 Cal 620, 625)”

Long v. Long,

76 CA (2d) 716, at 722 (2nd dist 1946)

(b) “When a judgment creditor has made a prima facie showing of due diligence it is incumbent on the debtor to show, if he can do so, that the creditor’s due diligence was not due diligence because the debtor did in fact hold title to property, which was not exempt from execution, during the five years following the entry of judgment, in such

a manner that the creditor in the exercise of due diligence could have subjected it to execution. Each case is to be determined upon its particular circumstances.”

So. Cal. Tel. Co. v. Damenstein,  
81 CA (2d) 216 (2nd dist 1947)

granting execution thirteen years after entry of judgment.

(c) “It is the intent of the law, and it would seem the intent as well of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case, is provided for by law. There must, then, be something added to the mere fact of the expiration of time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute, section 685 of the Code of Civil Procedure.

“Laches in legal significance, is not mere delay, but delay that works a disadvantage to another” (citing cases).

Demens v. Huene, 89 CA 748 at 752 (2nd dist 1928), granting execution after ten years from entry of judgment.

(d) “We see no force whatever in the contention that in making the order for the issuance of the execution, under the circumstances here appearing,

the lower court was guilty of an abuse of the discretion confided to it. Admittedly, the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and no reason whatever appeared [132] why in equity and good conscience he should not be compelled to pay the same. The failure of Plaintiff to earlier enforce the judgment which appellant should and could have at any time voluntarily paid, was entirely without prejudice to any of his legal rights, and did not render the granting of the order an abuse of discretion. Under such circumstances it would appear that the exercise of a sound discretion would require the enforcement of the judgment. What we have said upon the claim as to abuse of discretion sufficiently disposes of the claim that Plaintiff was not entitled to the remedy afforded by section 685 of the C.C.P for the collection of his judgment, by reason of laches."

*Doehla v. Phillips*, 151 Cal. 488, at 495 (1907), granting execution more than fourteen years after entry of judgment.

6. Enforcement of judgment in damages for fraud is not barred by bankruptcy of the judgment debtor, and filing proof of claim in bankruptcy proceeding is not waiver of claim for fraud. (Note: reference here is to the defendant Willis Allen who was adjudicated bankrupt in 1943).

(a) U. S. Bankruptcy Act as amended, 52 Stat 581 11 USCA 35.



(b) *Matthewson v. Naylor*, 18 CA (2d) 741  
(2nd dist 1937)

*Wilson v. Walters*, 19 C (2d) 111 (1941)

*In re Sideman*, 32 F Supp 574 (DCNY 1940)

*In re Birdwell*, 27 F Supp 442 (DC Tex 1939)

*Berkner v. Rubin*, 260 NYS 747

*Brown v. Hannegan*, 210 Mass 246, 96 NE 714  
(1911).

Dated: 31st day of March, 1950.

LEONARD HORWIN,  
Attorney for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE  
OF A. PHILLIPS

State of California,  
County of Los Angeles—ss.

A. Phillips, being sworn says: I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action; I served the Notice of Motion for Enforcement of Judgment After Lapse of Five Years from Date of Entry in this action by personally delivering to and leaving with the following persons at the County of Los Angeles, to wit, 1204 South Hill Street, City of Los Angeles, on the dates set opposite their respective names, a true copy thereof, to wit:

Willis Allen, April 13, 1950.

/s/ A. PHILLIPS.

Subscribed and sworn to before me this 3rd day of May, 1950.

[Seal]            /s/ [ILLEGIBLE],  
Notary Public in and for the County of Los Angeles,  
State of California.

My Commission expires December 16, 1953.

[Endorsed]: Filed May 5, 1950. [134]

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[Title of District Court and Cause.]

AFFIDAVIT OF WILLIS ALLEN IN OPPO-  
SITION TO PLAINTIFFS' MOTION FOR  
ENFORCEMENT OF JUDGMENT AFTER  
LAPSE OF FIVE YEARS FROM DATE OF  
ENTRY

State of California,  
County of Los Angeles—ss.

Willis Allen being sworn says, that he is one of the defendants in the above entitled action. That he makes this affidavit in behalf of himself and in behalf of all of the defendants who have appeared herein.

That neither he, nor any of the defendants herein, either while acting for himself or as agent for another, has at any time ever profited or received or obtained any property either real or personal or any money or benefit from any of the plaintiffs herein or from any other person connected with or involved in the transaction which was the basis of

the cause or causes of action for which judgment was given for the plaintiffs in this case No. 827-H in the United States District Court, Southern District of California, [135] Central Division.

That on or about July 27, 1943, affiant was adjudicated a bankrupt in this court under file No. 42543-OC and received his discharge in bankruptcy therein on or about October 13, 1943. That the indebtedness of the affiant to the plaintiffs herein was duly scheduled in said bankruptcy proceedings in time for proof and allowance, with the name of the creditor. That no money or property has ever been obtained by this affiant or by any of the defendants herein from the plaintiffs by false pretenses or by false representations, or by fraud while acting as an officer or in any fiduciary capacity, or otherwise or at all.

That therefore, the said debt and obligation of the defendants to the plaintiffs herein, insofar as this affiant is concerned, was released and discharged by said bankruptcy proceedings.

Furthermore, that the plaintiffs herein have not used due diligence and have not used even the minimum diligence required by law to entitle plaintiffs to an order granting plaintiffs' motion herein, for the following reasons, to wit:

(a) That within the five year period after the entry of judgment on or about October 18, 1941, this affiant acquired real property in his own name and the same was recorded in the office of the County Recorder of L. A. County on Feb. 27, 1945, and remained so recorded until long after the expiration

of the five year period following the entry of judgment herein, to wit until Jan. 15, 1949; that during said entire period from Feb. 27, 1945, until Jan. 15, 1949, there was no homestead filed thereon and said property had value in excess of \$10,000 over and above all of the encumbrances thereon and was subject to levy of execution by plaintiff, except for affiant's discharge in bankruptcy.

(b) That a mortgage upon real property in the County of Los Angeles in the sum of \$500 in which defendant Lawrence W. Allen [136] was named as the mortgagee was placed of record in the office of the County Recorder of Los Angeles County on or about March 31, 1948; that the plaintiffs herein, according to the affidavits filed herein by the plaintiffs in support of this present motion, appear not to have discovered or learned of said mortgage.

(c) That within the five year period following the entry of judgment herein, plaintiffs did not locate any property belonging to defendants subject to levy of execution; that plaintiffs within said five year period did not call to the attention of the court any property belonging to the defendants which was subject to levy of execution. That subsequent to the expiration of said five year period following the entry of judgment herein the plaintiffs have not located any property belonging to defendants subject to levy of execution and even now in their present application to the court do not call to the attention of the court any property belonging to the defendants which is subject to levy of execution.

(d) This affiant denies that the plaintiffs or their

attorneys have any basis of fact or any information upon which to predicate that portion of the affidavit of Leonard Horwin herein, wherein on page 4 thereof, lines 1 to 4 inclusive, said Leonard Horwin avers "That affiant (Horwin) is informed and believes, and on the basis thereof avers, that . . . the defendants are now in a position to satisfy said judgment or a part thereof."

(e) This affiant denies that this defendant or any of the defendants are now in a position to satisfy said judgment or any portion thereof.

That it would be inequitable and prejudicial to the defendants for the Court to grant plaintiffs' motion at this remote date not only in view of plaintiffs' lack of due diligence, but also because defendants have relied upon such lack of diligence and have therefore conducted themselves on the assumption that the plaintiffs no longer had the right to enforce said judgment. [137]

That in accordance with law, this affiant on behalf of himself and his co-defendants prays this Court to deny plaintiffs' motion not only as to this affiant but also as to all of the defendants herein.

/s/ WILLIS ALLEN.

Subscribed and sworn to before me this 1st day of July, 1950.

[Seal]      /s/ RUTH KEDDINGTON,  
Notary Public in and for the County of Los Angeles,  
State of California. [138]



DEFENDANTS' MEMO. OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF JUDGMENT AFTER LAPSE OF FIVE YEARS FROM DATE OF ENTRY

(1) The Bankruptcy Act states:

“A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as are liabilities for obtaining money or property by false pretenses or false representations . . .

11 U.S.C.A. 35 Chap. III, Sec. 17.

(2) By express provisions of the Act, there is excepted from the operation of a discharge a liability for obtaining property by false pretenses or false representations, obligations of this nature surviving the discharge thereunder. For the liability to come within this provision of the Act, it must appear

(a) that the bankrupt has made false representations,

(b) that these false representations were made with the intention of defrauding the creditor,

(c) that the creditor relied upon and was misled by the false representations,

(d) and that property or money was obtained as a result thereof.

If any one or more of these elements are lacking, the obligation will not survive the discharge in bankruptcy.

8 C.J.S., Bankruptcy Sec. 573, at pages 1513, 1514.

(3) "Not all frauds come within this exception to the operation of a discharge. It is only fraud in obtaining property by false pretenses or false representations which prevents the release of the bankrupt from the liability based thereon."

8 C.J.S., Bankruptcy, Sec. 573, page 1516.

*Zimmeren vs. Blount*, 238 Fed. Rep. 740, quoting from the syllabus, says: "Though a fraud may be committed in ways other than by false representation and still be actionable, it is only fraud by obtaining property by false pretenses or false representations which prevents the release of the bankrupt from his provable debts under the Bankruptcy Act July 1, 1898."

(4) Debts Not Affected by Discharge in Bankruptcy.

"In order to establish the liability of the bankrupt for such debt, the elements of the transaction must amount to obtaining property by false pretenses or false representation."

4 Cal. Jur. Bankruptcy, Sec. 32, page 86.

Bankruptcy will not discharge debt where the fruits of the wrong were received and used by the partnership.

*Crespi vs. Giffen*, 132 Cal. App. 526, 23 Pac. (2nd) 47.

(5) Obtaining Property as Prerequisite.

"The bankrupt must have obtained property for himself, or as agent, or have benefited therefrom, to bring him within the exception"

. . . "It is essential, of course, that property should have been obtained by the bankrupt as a result of the false representations, either for himself, or as agent for another."

8 C.J.S., Bankruptcy, Sec. 573, page 1518.

(6) Reason for Rule.

"We assume, in the consideration of the question, that Congress intended the language of the statute to be understood in its ordinary signification, and that the [140] purpose of the law was to prevent the bankrupt from retaining the benefits of property acquired by fraudulent means."

8 C.J.S., Bankruptcy, Sec. 573, page 1518, quoting from *Rudstrom vs. Sheridan*, 142 N.W. 313, 122 Minn. 262.

(7) Burden of Proof.

The burden of proof that a debt comes within an exception provided by Section 17 of the Bankruptcy Act rests upon the creditor. A creditor who would avoid the effect of a discharge in bankruptcy as to a judgment held by him against the bankrupt has the burden of proof that the note or obligation upon which the judgment was taken was an exception to the discharge.

6 Am. Jur. Bankruptcy, Sec. 810 and Sec. 813 (citing *Kreitlein vs. Ferger*), 238 U. S. 21, 59 L. Ed. 1184, 35 S. Ct. 685.

(8) Determination of Character of the Judgment Held by Plaintiffs.

In ascertaining whether a liability on a judgment was discharged in bankruptcy, the Court will go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and, when necessary, extrinsic evidence will be received for the purpose of determining the character of the debt.

Fitzgerald vs. Herzer (1947) 78 C.A. 2nd 127, 177 Pac. (2nd) 364.

“In determining whether the collection of the judgment, indicating that it was based upon fraud and deceit is barred by debtor’s discharge in bankruptcy, the language of the original judgment is not controlling as [141] to either party, but the record must be examined to determine the true nature of the acts upon which the judgment was based.”

Tudryck vs. Mutch (1948) 30 N.W. (2nd) 512, 320 Mich. 86.

(9) What Constitutes Due Diligence.

“It must be conceded that the mere examination of public records in the hope that a judgment debtor will acquire property in his own name constitutes a minimum of effort to locate property subject to execution, but it does not follow as a matter of law that more must be done under all circumstances to avoid a charge of negligence.”

Helvey vs. Castles, 73 C.A. 2nd 667, 167 Pac. 2nd 492.

Where, as here, the plaintiffs have not used even the minimum diligence required by law to avoid defendants' charge of lack of diligence amounting to negligence in locating and levying on property belonging to defendants, the plaintiffs have not made a showing sufficient to entitle them to the issuance of the order prayed for.

(10) Defendants' Comment on Plaintiffs' Memorandum of Points and Authorities.

Plaintiffs' Memorandum of Points and Authorities is divided into six paragraphs. The first five paragraphs thereof are devoted to plaintiffs' endeavor to convince this Court that the plaintiffs are entitled to enforce their judgment after a lapse of five years from date of entry.

Defendants find no fault and have no quarrel with the law laid down in any or all of the cases and authorities [142] cited by the plaintiffs in the first five paragraphs of plaintiffs' Memo.

Unfortunately for the plaintiffs, however, the law cited does not fit the undisputed facts in this case. The affidavit of defendant Willis Allen filed herein shows that the plaintiffs have not used due diligence or any diligence in locating and levying upon property belonging to the defendants during the five-year period following the entry of judgment.

Therefore, the cases which plaintiffs have cited in the first five paragraphs of their Memo. of Points and Authorities support the defendants rather than the plaintiffs.



Defendants particularly call the Court's attention to one of the cases cited and relied upon by plaintiffs, to wit: the case of Southern California Telephone Company vs. Damenstein, 81 Cal. App. 2nd 216, 224, and to the following cases referred to in the opinion in that case, namely, Beccuti vs. Columbo Baking Company, 21 Cal. 2nd 360, 132 Pac. 2nd 207; Hatch vs. Calkins, 21 Cal. 2nd 364; John P. Mills vs. Shawmut, 29 Cal. 2nd, page 63, 179 Pac. 2nd 570; Helvey vs. Castles, 73 Cal. App. 2nd 667.

All of these cases hold that where a judgment creditor has prima facie shown due diligence in an effort to collect a money judgment, a debtor may overcome such prima facie case by showing that the creditor's alleged due diligence was not actually such because the debtor held title to property not exempt from execution during the five years after the entry of judgment in such manner that the creditor in the exercise of due diligence could have subjected it to execution.

The Helvey vs. Castles case, *supra*, holds that the examination of public records for real property recorded in [143] the name of the debtor constitutes the minimum of diligence which a judgment creditor must exercise in order to avoid a charge of negligence.

It must be apparent then, that the plaintiffs herein did not exercise even that small required minimum of effort, otherwise they would have found property recorded in the name of defendant Willis Allen during the last year and eight months

of the five-year period following the entry of judgment and for several years thereafter.

Failure of the plaintiff to examine the defendants on supplementary proceedings would not in itself constitute failure on the part of plaintiff to exercise due diligence. But such failure to examine the defendants on supplementary proceedings when coupled with plaintiffs' failure to examine public records during the last year and eight months of the five-year period following the entry of judgment, may be taken into consideration by this Court when passing upon defendants' charge of lack of due diligence by the plaintiffs.

(11) Defendants' Comment on Paragraph 6 of Plaintiffs' Memorandum of Points and Authorities.

This, in Defendants' opinion, is the most important point in this case, yet plaintiffs devote to it only one short paragraph of 14 lines citing the Bankruptcy Act, and six cases.

Not one of the six cases cited support the plaintiff, instead, they support the defendants.

Plaintiffs contend that the right of enforcement of a judgment for damages for fraud survives the bankruptcy of the judgment debtor. Plaintiffs are warranted in that statement only to the extent of the provisions of the Bankruptcy Act as [144] amended.

Section 17 of the Act lists six cases of debts from which a debtor cannot be released from bankruptcy.

The second classification listed in Section 17 consists of "Liability for obtaining money or property by false pretenses or false representation," etc.

As defendants have pointed out in the foregoing Memo. of Points and Authorities it is only where the defendants have obtained money or property by false pretenses or false representations that the debt is not released by discharge in bankruptcy.

(Sub. 4) of Section 17 refers to another class of debts not released by discharge in bankruptcy, namely, "Those created by fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." Plaintiffs do not claim that the debt represented by plaintiffs' judgment against the defendants herein was created while any of the defendants were acting as an officer or in any fiduciary capacity.

Therefore, unless plaintiffs can show that plaintiffs' judgment, even though it be for fraud, is based upon a liability for obtaining money or property by false pretenses or false representations, must concede that the discharge in bankruptcy released the defendant Willis Allen from the debt.

Plaintiffs' affidavit in support of the present motion did not charge that plaintiffs' judgment is based upon a liability for obtaining money or property by false pretenses or false representations. The affidavit of defendant Willis Allen is undisputed to the effect that none of the defendants have obtained any money or property from any of the plaintiffs by false pretenses or by false representations, or otherwise, or at all. [145]

If it becomes necessary, an inspection of the entire record in this case will show that no money or property ever passed from the plaintiffs to the defendants.

In each of the six cases cited by plaintiffs in paragraph 6 of plaintiffs' Memo. of Points and Authorities, it will be observed that the defendants obtained either money or property by false pretenses or false representations. Therefore, the six cases cited by the plaintiffs fail to support their claim that the judgment herein was not released as to the defendant Willis Allen by his discharge in bankruptcy, and are not in point.

In fact, the six cases cited support the defendants who claim that the discharge in bankruptcy released the defendant Willis Allen from the debt because it was not a liability for obtaining money or property by false pretenses or false representations.

The debt therefore does not survive the discharge in bankruptcy of defendant Willis Allen.

Dated July 1, 1950.

Respectfully submitted,

/s/ LAWRENCE W. ALLEN,

Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 3, 1950. [146]

In the United States District Court, Southern  
District of California, Central Division  
No. 827

M. P. BARBACHANO, et al.,

Plaintiffs,

vs.

LAWRENCE W. ALLEN, WILLIS ALLEN,  
M. F. DEXTER, CINEMA ADVERTISING  
AGENCY, et al.,

Defendants.

ORDER

Westover, J.

Plaintiffs herein made a Motion for Enforcement of Judgment After Lapse of Five Years From Date of Entry. The Notice of Motion was directed to Willis Allen, Lawrence W. Allen, M. M. Dexter, also known as M. F. Dexter, and Cinema Advertising Agency, defendants, and said plaintiffs moved the court to issue its order directing that Writ of Execution upon the judgment for plaintiffs herein in the sum of \$86,210.42, together with costs in the amount of \$343.99 and interest at the statutory rate to date, issue against defendants, notwithstanding the lapse of more than [147] five years since the entry of said judgment.

The matter came on regularly for hearing on July 3, 1950, in the above-entitled court before Honorable Harry C. Westover, judge presiding, Leonard Horwin, Esquire, appearing as attorney for plaintiffs and Lawrence W. Allen, Esquire, ap-



pearing as attorney for defendants, and evidence having been introduced and the parties having filed briefs herein, and the matter having been submitted to the Court for decision.

The Court Finds that subsequent to entry of said judgment defendant, Willis Allen, filed a petition in bankruptcy in which petition said judgment was listed; that thereafter said Willis Allen received a discharge in bankruptcy and has been thereby released from the liability of the judgment.

The Court Further Finds that plaintiffs have not been guilty of laches and that the judgment may be enforced or carried into execution, irrespective of the fact that more than five years have elapsed from the date of its entry.

Wherefore, It Is Ordered that the Writ of Execution upon the judgment for plaintiffs herein in the sum of \$86,210.42, together with plaintiffs' costs amounting to \$343.99, and interest at the rate of seven (7%) per cent per annum, issue against all defendants named in said judgment, with the exception of defendant Willis Allen.

Dated: Oct. 12, 1950, Los Angeles, Calif.

/s/ HARRY C. WESTOVER,

United States District Judge.

Judgment entered Oct. 13, 1950.

[Endorsed]: Filed October 12, 1950. [148]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT  
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that M. P. Barbachano and The Border Electric and Telephone Co., Inc., a corporation, plaintiffs and judgment creditors in the above-entitled action, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the following described parts only of the Order of the Honorable Harry C. Westover, United States District Judge, dated October 12, 1950, and entered October 13, 1950, at Book 68, page 471, of Judgments, to wit:

The part of said Order contained on page 2 thereof, lines 10 to 15, wherein the Court finds that the defendant Willis Allen has been "released from the liability of the judgment" herein by his "discharge in bankruptcy" "subsequent to entry of said judgment"; and

The part of said Order contained on page 2 thereof, [149] at line 25, wherein the Court orders that the defendant Willis Allen be excepted from the writ of execution ordered to issue "against all defendants named in said judgment," thereby denying execution upon the judgment as to the defendant Willis Allen.

Dated: October 20, 1950.

/s/ LEONARD HORWIN,

Attorney for Appellants M. P. Barbachano and The  
Border Electric and Telephone Co., Inc., a  
Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 10, 1950. [150]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 160, inclusive, contained the original Amended Complaint for Declaratory Relief, for Injunction and for Rescission and Damages; Amended Answer of Defendants Lawrence W. Allen, Willis Allen, Cinema Advertising Agency, and M. M. Dexter and Counter-Claim; Objection to Granting of a Temporary Injunction and Affidavits of Lawrence W. and Willis Allen; Petition for Leave to File Amendment to Amended Complaint and Amendment to Plaintiffs' Reply to Defendants' Amended Counter-Claim with Order Thereon Allowing; Amendment to Plaintiffs' Amended Complaint; Plaintiffs' Partial Itemized Account of Costs of Procuring Radio Concession and Constructing and Maintaining Radio Station XERB; Plaintiffs' Additional Itemized Account of Costs of Procuring Radio Concession and Constructing and Maintaining Radio Station XERB; Memorandum of Conclusions, Judge Hollzer; Findings of Fact and Conclusions of Law; Judgment; Notice of and Motion for Enforcement of Judgment After Lapse of Five Years from Date of Entry with Affidavits of Leonard Horwin, Cleveland B. Swift, William M. Rabow and Memorandum of Points and Authorities; Affidavit of Willis Allen in Opposition to Plaintiffs' Motion for Enforcement of Judgment

After Lapse of Five Years from Date of Entry, and Defendants' Memo. of Points and Authorities in Opposition to Plaintiffs' Motion for Enforcement of Judgment After Lapse of Five Years from Date of Entry; Order; Notice of Appeal; Appellants' Designation of the Points on Which They Intend to Rely on Appeal; and Appellants' and Appellees' Designations of Contents of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.80, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 30th day of November, A.D. 1950.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

[Endorsed]: No. 12759. United States Court of Appeals for the Ninth Circuit. M. P. Barbachano and The Border Electric and Telephone Co., Inc., Appellants, vs. Lawrence W. Allen, Willis Allen, M. F. Dexter and Cinema Advertising Agency, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 1, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit  
Case No. 12759

M. P. BARBACHANO, et al.,

Appellants,

vs.

LAWRENCE W. ALLEN, et al.,

Appellees.

APPELLANTS' DESIGNATION OF THE  
POINTS ON WHICH THEY INTEND TO  
RELY ON APPEAL

(Rule 19, Subdivision 6)

The appellants, M. P. Barbachano and The Border Electric and Telephone Co., Inc., a corporation, hereby designate the following points on which they intend to rely on appeal:

(1) That the District Court erred in finding that the defendant Willis Allen had been released from the liability of the judgment herein by his discharge in bankruptcy;

(2) That the District Court erred in ordering that the defendant Willis Allen be excepted from the writ of execution ordered to issue against all defendants named in said judgment, and in denying execution upon the judgment as to the defendant Willis Allen;

(3) That the judgment for damages in favor of the appellants herein and against the defendants

including Willis Allen comes within Section 17 of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 550, 11 USCA 35, as amended) which provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another," and that accordingly the defendant Willis Allen was not released from the liability of said judgment by his discharge in bankruptcy, and the District Court committed reversible error in denying execution upon the judgment as to the defendant Willis Allen.

Dated: December 5, 1950.

/s/ LEONARD HORWIN,  
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1950.

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[Title of Court of Appeals and Cause.]

APPELLANTS' DESIGNATION  
OF CONTENTS OF RECORD OF APPEAL

(Rule 19, Subdivision 6)

M. P. Barbachano and The Border Electric and Telephone Co., Inc., a corporation, appellants herein, herewith designate the following portions

of the record, proceedings, and evidence to be contained in the record on appeal:

(1) Plaintiffs' "Amended Complaint" dated June 3, 1940, and filed herein on or about the same date;

(2) The "Amended Answer of the defendants Lawrence W. Allen, Willis Allen, Cinema Advertising Agency and M. F. Dexter and Counterclaim" dated June 24, 1940, and filed herein on or about the same date;

(3) Plaintiffs' "Petition for Leave to File Amendment to Amended Complaint and Amendment to Plaintiffs' Reply to Defendants' Amended Counterclaim," and order granting it, both dated and filed herein on or about May 19, 1941;

(4) "Amendment to Plaintiffs' Amended Complaint," dated May 19, 1941, and filed herein on or about the same date;

(5) "Memorandum of Conclusions, Judge Hollzer, September 17, 1941," filed herein on or about that date;

(6) The Court's "Findings of Fact and Conclusions of Law," signed and filed herein on or about October 18, 1941;

(7) The Court's Judgment, made and entered herein on or about October 18, 1941;

(8) Plaintiffs' "Notice of Motion for Enforcement of Judgment after Lapse of Five Years from Date of Entry" (California Code of Civil Pro-

cedure, Section 683) and the "Motion for Enforcement of Judgment after Lapse of Five Years from Date of Entry" and attachments thereto, all filed herein on or about May, 1950;

(9) "Affidavit of Willis Allen in Opposition to Plaintiffs' Motion for Enforcement of Judgment after Lapse of Five Years from Date of Entry," dated July 1, 1950, and filed herein at a date in July of 1950;

(10) The Court's "Order for Writ of Execution on Judgment," dated October 12, 1950, and entered herein on October 13, 1950.

Also Notice of Appeal.

Clerk's Certificate.

Dated: December 5, 1950.

/s/ LEONARD HORWIN,  
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1950.

